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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959-1960

No. 100-53

ALVIN R. CAMPBELL, ARNOLD S. CAMPBELL AND
DONALD LESTER, PETITIONERS,

vs.
UNITED STATES

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 22, 1960

CERTIORARI GRANTED MARCH 2, 1961

[A]

**In United States Court of
Appeals**

For the First Circuit

No. 5371.

ALVIN R. CAMPBELL,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE;

No. 5372.

ARNOLD S. CAMPBELL,

DEFENDANT, APPELLANT,

v.

SAME;

No. 5373.

DONALD LESTER,

DEFENDANT, APPELLANT,

v.

SAME;

Consolidated Record Appendix to Brief for Appellee

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 766

ALVIN R. CAMPBELL, ARNOLD S. CAMPBELL AND
DONALD LESTER, PETITIONERS,

vs.

UNITED STATES

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

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In the United States District Court, District of Massachusetts
Criminal #57-280

UNITED STATES OF AMERICA

v.

ALVIN CAMPBELL, ET AL.

STENOGRAPHIC RECORD OF TRIAL

[74]

FRANCIS L. YATES, Sworn

Direct Examination by Mr. Koen

Q. What is your name, sir? A. Francis L. Yates.

Q. And where do you live? A. 155 Laureston Street, Brockton.

Q. By whom are you employed, sir? A. Norfolk County Trust Company in Canton.

Q. How long have you been employed by the Norfolk County Trust Company? A. Since June of 1953.

Q. What was your position on the 18th day of July, 1957? A. Acting assistant manager.

Q. And your post of duty was where? Canton? A. I beg your pardon?

Q. Your post of duty was in Canton. A. In Canton, yes.

Q. On the morning of July 18, 1957, sir, were you in your regular position in the banking quarters about 10 o'clock in the morning? A. Yes.

Q. And will you use that chart, which is Government's Exhibit #5, to point out to the jury where you were working on the morning of July 18th, or where your desk was located on the morning of July 18th? A. [Indicating.] At this desk here.

Q. You are now pointing to the second desk in the work space which is just behind the conference room which is to the front of the building; is that right? A. That's right.

Q. And the desk—so far as the appearance on that chart is concerned, sir, counting from the front of the bank, it is the third desk, is that correct, including the one which is in the conference room? A. That's right, this desk right here.

Q. While you were seated at that desk, sir, did you have occasion, about 10 o'clock in the morning, to notice the time with any particularity? A. Yes. I was thinking I would take a coffee break and I looked at my watch. According to my watch it was approximately 5 minutes past 10.

Q. Did you leave the bank at that time when you observed your watch reading 10:05? A. No, sir.

Q. Did something happen a short time after you made that observation with reference to the time? A. Yes, I was seated at my desk typing when I heard the door to the entrance of the manager's and assistant manager's area rattle.

Q. May I interrupt? Before that did you see Mr. Leonard in the banking quarters, about that time? A. Yes, I did.

Q. Did you have some talk with Mr. Leonard? A. Just prior to that he made—

Mr. O'Donnell: Object.

Q. Not what the talk was. Did you have some talk? A. Yes, I did.

Q. As a result of some conversation you had with Mr. Leonard, did you see what Mr. Leonard did? A. He left the bank.

Q. Going back to the point where you said you were seated at your desk and you heard something, will you go on from there, please, sir? A. When I heard this door rattle, which it does most of the time. People try to come in, not knowing it is locked. And I turned around and saw this negro standing there—

Q. May I interrupt you, sir? A. Yes.

Q. You are talking about a door which rattles. Will you use that pointer and indicate on Government's Exhibit #5 what door you are referring to? A. I am referring to this swinging half door right here, this small door, and on this door on the inside is a type of latch which prevents anyone from coming in from the outside without

reaching over or one of us inside here opening that door.

Q. And that door on that chart, sir, is the door which permits the public to come into the work space as indicated on there; is that right? A. That's right.

Q. And it is between the front end of the tellers' cages and the wall of the first conference room? A. That's right.

Q. You have referred to it as a half door, sir. Is it a half door or is it actually a gate? A. I think perhaps the correct term would be a gate.

Q. When you heard this rattle, or whatever you describe it at that gate, sir, you said you turned around and you saw a negro? A. Yes.

Q. Tell us what happened next. A. I got up from my chair and walked over in the direction of this man, and on my way over I asked if there was anything I could do for him, and when I got to him he said, in substance, "Yes. This is a holdup." And I am not sure but whether the command to let him in was made or not, but when I looked down there was a dull silver looking gun in his hand.

Q. What next did you do, sir? A. I reached down, opened the latch—I opened the latch and opened the door and as I did so he reached down and picked up a bag that was on the outside, or his side of the door.

Q. Can you give us a description of that bag, sir? A. It was a—I don't know exact color, more or less a brown, maroon zipper type businessman's briefcase with a flat bottom tapering up to the top.

Q. And after the briefcase that you have described was picked up, what next happened? What did the man do who picked up the briefcase? A. He ordered me into the section where I was originally, following me into that area.

Q. By that you mean the area where you have described on this chart your desk was situated that morning? A. He ordered me in through here and to this area here.

Q. What did he do after he gave you those instructions? A. He followed me in.

Q. And when you reached that area, was anything said to you by this man? A. Yes.

Q. What was said, sir? As near as you can remember it, if you can't remember it exactly. A. The substance of it was to put my—well, he ordered me to put my hands up, and I did so, and at the same time ordered me to face this part of the bank here.

Q. And you are now pointing to— A. Right here.

Q. All right. Let me ask you this: What portion of the bank were you facing when you took the position he suggested? A. From here facing over in this direction.

Q. You are now pointing to the rear of the bank at a point on the chart which is designated "Coupon Booth"; is that right? A. Yes.

Q. While you were in that position, sir, did you hear anything in the bank? Did you hear something? A. Yes. I heard a commotion among the tellers and when I got to the place I have just described, I looked and saw all the tellers, that is, Mr. Mull, Mr. Kennedy, Mrs. Milligan, in this area. Right in here.

Q. You are now pointing at an area which is directly behind that portion of the chart which shows an open space into the tellers' cage and near the words "work space"; is that correct? A. Yes, sir.

The Court: Will you indicate to the jury where you were sitting? Was this man outside the bank when you saw him first? That is, if you hadn't opened that gate he couldn't have got into the bank?

The Witness: Not into my area, unless he knew about that latch.

The Court: He was on the outside of the bank, then?

The Witness: Yes.

Mr. Koen: It all depends what you mean by "outside of the bank."

The Witness: Outside the gate.

The Court: But he was in the bank?

The Witness: Yes.

The Court: He was inside the bank, but he was outside the gate?

The Witness: That's right.

The Court: Just like I am enclosed here.

The Witness: That's right.

Q. Will you point out, sir, where this man was who was rattling the gate? A. He was at this gate here, which is just inside the main doors of the bank.

Q. And at a point between Teller Cage No. 1 and the gate; is that correct? A. Between this and this wall right here. On this side of the gate, the entrance side of the gate.

Q. And you look at it laterally from a point between Teller's Cage No. 1 and the gate itself; is that right? A. No. He was right in the center of the gate when it is closed.

Q. But inside the banking quarters? A. Yes.

Q. Now, sir, while the tellers were in the position you just told us and you were in that position, where was the man whom you — let in through the gate? A. Right behind me, approximately here. There are two filing cabinets, one here just after you come in and another one up against this portion of the wall here. He was between the two.

Q. And do you say he was between the two filing cabinets? A. In that area between the two filing cabinets, yes.

Q. In what position, sir, was he? A. At that moment he was standing.

Q. Did you have some talk with him at or about that time? A. During his time there, he asked me, or ordered me to open this door.

Q. You are now pointing to a door that separates the front part of the working space which is occupied by the officers from the rear space; is that correct? A. Yes, sir.

Q. That door, sir, will you tell us whether or not that can be opened from the officers' side by a knob or by a hand movement? A. It cannot be opened from this side without a teller inside, or the secretary opening that door.

Q. I think you said you were asked to open that door; is that right? A. Yes, sir.

Q. By this man who had rattled the gate. What was your answer to him? A. I told him I couldn't open it. I did not have a key.

Q. Then following that statement, did you observe something, sir? A. He kept asking me to open it and I repeated I could not do so. I am not certain of the time, but in my position, looking, shall I say, a little bit out to the side of my angle of vision here, I saw Officer Fitzgerald come in and he went over to the customers' desk at the side of the bank, over in there. He was ordered to put his hands up and, in substance, not to move or he was a dead cop.

Q. With reference to the area where you were standing, sir, at or about that time did you observe anything? A. The—approximately during that time the telephone rang.

Q. Before the telephone rang, sir, did you observe anything? Did you observe another person other than an employee of the bank in the working space area?

Mr. O'Donnell: Objection.

A. Yes, I did. I observed—

Mr. Koen: Wait a minute; there was an objection.

The Court: Is there an objection?

Mr. O'Donnell: Yes, your Honor.

The Court: Do you object because it is leading?

Mr. O'Donnell: Yes, your Honor.

The Court: I think you better re-frame the question, Mr. Koen. It is a little bit leading.

Q. At the time that you were standing, sir, in the position which you have described near your desk and

at a time when the three fellow were standing just outside their cages and into the working spaces, sir, did you see something else happen in that general area? A. Yes.

Q. Tell us. A. I noticed a man in a dark blue suit and a—well, a felt hat, I would say, common hat that we wear, and glasses, with a gun in his hand standing up against this partition right here, which is to the right of the door as you enter the bank.

Q. Did you observe anything in the work area? A. In the work area the tellers were coming from their windows to the area that I mentioned. I noticed them in this section here. And at the repeated orders to open the door, which I replied I could not, all of a sudden another person came from behind me where I was standing right here, came in through here, and there is a typewriter right here at this desk at which I was working. From what I noticed afterwards, with the position of the keys on the typewriter, he must have stepped on this typewriter—

Mr. O'Donnell: Object.

A. [Continued.] —and vaulted this—

Mr. Koen: There is an objection, sir.

The Court: You must testify to what you saw happen. You can tell what he did.

A. [Continued.] This person came from behind me, jumped over this wooden and glass partition, landed on this desk here and came around to this door which I had said I could not open.

The Court: If you don't mind, I am going to permit the jury to take a coffee hour—or, I should say, coffee respite.

[Brief recess.]

Q. Now, Mr. Yates, just before we recessed you told us about a man who came over a partition onto a desk at the rear of the partition? A. Yes.

Q. At the time the man landed on the desk to the rear of

the partition here, did you get a chance to observe him?
A. Yes.

Q. What did you observe, sir?

Mr. O'Donnell: Object.

Mr. Koen: Wait just a minute.

[A brief pause.]

The Court: Pardon me.

[A brief pause.]

Mr. O'Donnell: I will withdraw the objection, Mr. Koen.

[A brief pause.] ●

Mr. Koen: I understand the objection has been withdrawn.

The Court: I know what the objection is. The question was what he observed, and I will allow it. Go ahead. Pardon the interruption, but I picked up a matter in the lobby that necessitates some action on a civil case I have.

Q. Go ahead, sir. A. I noticed to my left he leaped over the partition and landed on the desk at the other side of the partition and my next recollection is seeing him in a crouched position at the other side of this locked door, at which time I noticed he had a covering over his face, and he proceeded to open the door, which can be opened in an ordinary manner from that side of the area of the bank.

Q. Did you notice anything else, sir? A. The next recollection I have is this same man, starting No. 1 teller's cage, opened the drawers, the money drawers, and take out the money. And he did so with this right hand. In his left was the receptacle which he put it in. I don't recall whether it was a paper bag or cloth bag, or what it was. He went up the line of cages through to the fourth one, taking money out of the drawers.

Q. At any time while you observed him, sir, did you see anything in his hand other than the bag which you described?

Mr. O'Donnell: Object.

The Court: I will allow it.

A. He had a gun in his left hand.

Q. And where was he when you first noticed that he had a gun in his left hand, or when you first noticed that he had a gun? A. I am not certain whether he had it in his right hand when he vaulted the partition or not. I believe my first recollection would be inside the tellers' cages.

Q. After this man who had vaulted the partition had gone through the tellers' cage drawers, did you hear some conversation in that general area where you were standing and the tellers were standing?

Mr. O'Donnell: Object.

The Court: I will allow it.

Mr. Koen: Yes or no.

The Court: Go ahead.

A. The man behind me—

Mr. Louison: Yes or no.

The Court: No. He can go ahead. Answer it in your own way. If he is beginning to answer, the answer is yes. You did hear something?

Q. Tell us what you heard, please. A. The man behind me kept repeating after—I beg your pardon, let me restate that. After the man had taken all the money out of the tellers' cash drawers, the man behind me kept repeating in a very quick voice, "Let's get out of here; let's get out of here." And I recall a few remarks that were made prior to that. May I say so now?

Q. Yes. A. This man who had his gun on me—

Q. Let me interrupt you there. When you say this man who had his gun on you, is that the man whom you met at the gate? A. Yes.

Q. All right, sir. A. Evidently either—I don't recall which—either through the man in the—the man in the

dark suit said it, or whether this man who had is gun on me, the man I let in, noticed, but he kept saying, "Someone's coming in; someone's coming in," and he appeared to be very nervous. I could not observe a—

Mr. O'Donnell: May the "appeared to be nervous" go out?

The Court: No, I will allow that to stand. He can describe his appearance. You may cross-examine him on it, Mr. O'Donnell, fully.

A. [Continued.] In his manner of speech, everything appeared to be anxious that they get out of there at that time. After the man who vaulted—

The Court: Is that what you mean when you said he appeared to be nervous? Is that the reason you say he appeared to be nervous?

The Witness: Because of his quick speech.

The Court: All right.

The Witness: Yes. After the man who vaulted the partition opened the door, the next I recall seeing that man was by the secretary's desk, which is this desk right here.

Q. So that it will be clear, when you say—first of all you pointed to a desk, and that is the first, second, third, fourth, fifth, desk at the end of the row, including the one which is in the conference room at the front of the building; right? A. Yes, sir.

Q. Whom did you say you noticed standing at that desk?

A. The man who vaulted the glass partition.

Q. All right, sir. A. And I—the substance of it was that the orders were given to go into the vault, this main vault here and get the cash out of those vaults.

Q. Before I go into that, during the time that the man who vaulted the partition was in the tellers' area and moved to that desk which you have described, where was the man whom you say you let in through the gate?

Mr. O'Donnell: If you know.

A. He was behind me to my right.

Q. And was he or was he not in your view, entirely or partially? A. Partially.

Q. Can you tell us where he was standing? A. Yes. Not on this map, as I said, were two filing cabinets. He was in the area between the two filing cabinets when he first came in.

Q. Other than a standing position, did he assume any other position while you observed him? A. Yes, he did.

Q. Directing my question to that man, the man whom you let in through the gate, did you observe him doing anything with relation to the tellers? A. To the best of my recollection his concentration was on me. He did—after the door was opened by the man who vaulted the partition—take, his gun still in his right hand and in a crouched position between the two filing cabinets, unzip the bag he had and take out a paper bag and throw it along the floor to Mrs. Milligan, one of the tellers. After the tellers had been ordered to take the money out of their own vaults—their own cash box in the main vault.

Q. Did you see Mr. Leonard return to the bank that morning? A. Yes, I did.

Q. And where did you see Mr. Leonard for the first time in the bank premises after you say he left? A. Out of the corner of my eye in the position that I was standing, I saw him come through that gate that I let the man in.

Q. At some time did he come to the area of the bank where you were standing, or that portion of the bank where you were standing? A. Yes, he did.

Q. Did you see or hear anything with relation to Mr. Leonard from the time you saw him when he entered the bank until the time he came to the portion of the bank where you were standing? A. Yes.

Q. Tell us, please. A. In substance he was—I recall hear-

ing someone, I do not know who, mention that he was the head man or the manager of the bank and the man who was holding me pointed his gun at him and told him to go in and empty the vaults, at which time he said that he could not because he didn't have the key or combinations.

Q. You have used the expressions, sir, "holding me" and "had a gun on me"; am I right? A. Yes, sir.

Q. Do you see in this courtroom today the man whom you say you let in through the gate and was holding a gun on you that morning? A. Yes, sir.

Q. Will you step down from the stand, sir, and point out to this court and jury the man whom you let in through that gate that morning who had a gun in his hand and pointed it at you.

A. [Complying.] This man here, sir.

Mr. Koen: Will you stand up, please?

[A defendant rises.]

Mr. O'Donnell: Objection.

The Court: It is clearly admissible. What is your objection, Mr. O'Donnell? A man picks out a person that he says put a gun up to him. Do you mean he hasn't a right to tell it? The weight is for the jury.

Mr. O'Donnell: We discussed the legal grounds previously at the bench.

The Court: It is a perfectly proper question. When I admit it, Mr. Foreman and ladies and gentlemen of the jury, don't be led into a false sense of feeling that I am doing anything that is wrong. I realize what my responsibilities are. Just use your common sense. It is for you to say. The weight of it is for you. It is clearly admissible.

Mr. Koen: May the record reflect that the witness has pointed to the defendant Arnold Campbell?

Q. Will you take the stand again? A. [Complying.]

The Court: Please remember, now, when I do this all I do, you are the finders of fact. The weight of the testi-

mony, the value, its quality, its quantity, the yardsticks by which you form a judgment in conformity with the law that I am giving you, that is for you. I am not passing upon the truth or falsity, the correctness or incorrectness of the testimony. Obviously if you didn't have those rules of evidence, we would have no orderly trial. The witness has done that which he had a right to. The weight of it, however, is for you.

Q. Going back, if I may, to the question which I asked prior to the last series, you were telling us what you had heard and observed with reference to the time between Mr. Leonard's re-entry into the bank and the time he came to the area where you were standing. Will you tell us, please, what you heard and what you observed?

A. As I stated, the substance was that Mr. Leonard was by someone identified as the bank manager and was ordered to open the cash vaults inside the main vault. Prior to—I recall one other thing at the time before Mr. Leonard came in, if I may. The telephone rang and I was told to answer it and in no way or manner allow or tell what was going on.

The Court: Who told you that?

Mr. Koen: May I—

The Court: Go ahead. All right.

Q. Will you first tell me, or rather, point, using Government's Exhibit No. 5, where you were standing when the phone started to ring. A. Right here.

Q. And you are now pointing at the outer corner of your desk, or near the outer corner of your desk? A. That is right, sir.

Q. What happened when the phone rang, sir? A. I was ordered by this man here that I had let in at the gate to answer the phone, which is on this desk.

Q. And that man is the man whom you have pointed out

here in the courtroom and who has been indicated as Arnold Campbell; is that right? A. Yes, sir.

The Court: What did he say to you? Tell the conversation.

The Witness: In substance to answer the phone and not say anything about what was going on, which I did, and as it so happened there was no one on the line. The phone had rung twice. I picked it up and there was no answer on the other end of the line, so I hung ti up.

Q. I think you testified that you saw Officer Fitzgerald enter the bank? A. Yes, I did..

Q. Or in the bank? A. Yes.

Q. Did you hear or observe that other people came into the bank during the time following your allowing this man in through the gate? A. I heard that they were coming in. My only recollection is of Officer Fitzgerald, as an individual, and mostly by his uniform.

Q. Now, sir, after Mr. Leonard came to the rear of the bank that morning where you were standing, did you observe what Mr. Leonard did? A. Yes, I did.

Q. And can you tell us what you observed him do when he first entered the bank, or that section of the bank?

Q. After his conversation with the man whom I let in at the gate, he proceeded through the open door here and was—and stopped with the other tellers who were in this area here. There is also, on this corner, what we term a Recordak, which is a photographing machine, and they were setting on a table here and they were in this area right around this table, and he proceeded to that point.

Q. Let me interrupt you there, sir. You say after a conversation with the man whom you had let in. Do you remember that conversation, sir, or the substance of it?

A. The substance of it was that he was ordered to take—to open the vaults, the cash vaults in the main vault.

Q. After he went to the area which you have just described, what next did you see Mr. Leonard do? A. To the best of my recollection the next was the telephone ringing and the secretary, Mrs. Engley, who was at this desk here, answering the phone and it was for Mr. Leonard and he was directed—I do not recall by which man—to answer the phone and under similar threats, you give only—

The Court: Now, you have to say what he said. You can't characterize it. Say what was said, to the best of your memory. Don't misunderstand me, I am not catechising you.. Just do your best.

A. [Continued.] To the best of my recollection he was ~~ordered~~ to answer the phone and not say anything other than in an ordinary manner. He answered the phone. What the discussion was I don't recall. And he completed his call and hung up the phone.

Q. Have you told us all that was said to him by the person who gave him instructions to answer the phone, as near as you can remember it?

A. When Mr. Leonard was with the other tellers, after he had passed through the gate that the second opened. As I recall, the substance was the same in a repeated form, to open the cash vaults in the main vault, to which he replied he could not.

Q. I'm sorry, sir, I didn't make myself clear. Directing your attention to the telephone call which was turned over to Mr. Leonard, have you told us now everything that was told to Mr. Leonard before he answered the telephone, as near as you can remember it? A. I believe I have, yes.

Q. For the purpose of refreshing your memory, sir, was there a mention made about—

Mr. O'Donnell: I object to this refreshing his memory. His own witness.

The Court: Pardon me.

Mr. Koen: I have asked a question to which there has been an objection.

[The question and the objection are read.]

The Court: Go ahead. You may finish the question. It isn't finished, is it?

Mr. Koen: No, sir.

The Court: All right.

Q. Was there some mention made at that time, sir, about a signal or an alarm or a warning? A. Yes, there was.

Q. Tell us now, with your memory refreshed, what was said. A. The man whom I let in the gate, the first gate, made it quite plain that if any alarm had been rung and any officers came into the bank and there was any shooting, we would get it, and Mr. Leonard would be the first.

Q. Did you say that Mr. Leonard went into the vault, sir? A. No, I did not.

Q. Did you see him go into the vault or in the direction of the vault? A. I saw him go in the direction of the vault.

Q. At some time did he return to the general area where you were standing? A. He did.

Q. Following his return did you observe what happened? A. Yes. Each teller was made to go into the main vault individually and put the contents of his own—

Q. Wait a minute, now. Did you see this, sir? A. I did not see it. I heard what was instructed.

Q. What did you hear?

The Court: Tell the jury what you heard.

A. I heard the instructions—

The Court: No, you have got to say what he said. Who was it that said it?

The Witness: The man who vaulted the partition, to the best of my recollection, was the man who ordered the individuals to go in.

Q. What did that man say? A. In substance, to go into the vault and empty the cash bureau—your own cash vault.

The Court: Did each teller have a section of that vault with a separate box and with a key to it?

The Witness: Yes, sir.

The Court: To open that, the teller was the only one who could do that?

The Witness: There are keys as well as combinations on that, and the individual teller is the only one who can open it.

The Court: The purpose is to check up at the end of a day's business and ascertain what the money was that was taken in and what was given out by each teller?

The Witness: That's right.

Mr. O'Donnell: Object.

The Court: If you object—I don't know—isn't that what it is?

The Witness: That's right, because each individual teller has complete account for his or her own cash.

Mr. Koen: I think that has already been testified to by Mr. Leonard.

The Court: That is asked without any thought or suggestion at all of causing any prejudice one way or the other. It is simply a routine procedure of the bank. I think it was testified to by Mr. Leonard, Mr. O'Donnell.

Q. Now, sir, after the incident you have just described about the tellers going into the vault area, what next happened? A. To the best of my recollection we were ordered to go into the vault, the main vault.

Q. And did you go into the vault? A. We did.

Q. Where were you in the line of march of those entering into the vault that day? A. I was the last one, with Mr. Leonard at my left side, to go into that vault.

Q. Can you help us as to who gave the instructions to go into the vault, sir? A. Personally, the man behind me ordered me to go in.

Q. As you were standing in the vault—

The Court: When you say the man behind you, tell the jury what you mean.

The Witness: The man whom I let in the gate.

Q. The man whom you have identified here this morning as Arnold Campbell? A. Yes, sir.

Q. When you and Mr. Leonard were standing in the vault, will you tell us what happened, sir, and what was said, if anything? A. We went into the vault from my area here through this area here, and as I approached this section, approximately here, to the best of my recollection it was the man in the blue suit who said to not look around. And also that we would not suffocate. Mr. Leonard and I were the last two in. There is a ramp right here to the entrance of the vault and when we were in there, the ramp was put up and the door closed.

Q. Is that vault, sir, equipped with an air vent? A. Yes, it is.

Q. Was the air vent put into operation that morning while you people were in the vault? A. No, it was not, to the best of my recollection.

Q. Was it equipped with an alarm button? A. Yes, it was.

Q. Was that, to your knowledge, pressed? A. I believe it was, yes.

Q. All right, sir. Can you tell us, sir, the approximate time that you entered the vault? A. I have no means of identifying except I would say approximately 10:30.

Q. Now, with reference to the man whom you say you let in through the gate and whom you have indicated as the defendant Arnold Campbell, will you tell us how he was dressed on that day, sir? A. He had, shall I say, work clothes in the form of what looked to me like chino pants and a T-shirt, white or light-colored T-shirt.

[853] Q. And the man whom you say leaped over the partition? A. He had on a covering over his face up to

here on his nose and to the best of my knowledge a cap and a blue type work shirt which was not—which was out over his trousers.

Q. And it was not tucked in? A. It was not.

Q. As to the complexion of the man whom you let through the gate first? A. He was colored.

Q. The man whom you say had a mask on at a point below his eyes? A. He was colored.

Q. And the man whom you say was in a blue suit? A. He was also colored.

Q. With reference to the man whom you let in through the gate and whom you say was wearing a T-shirt, during the time you had him under observation, sir, did you observe him do anything with reference to that T-shirt?

A. Yes, he tried to cover his face once or twice by pulling the T-shirt up, but it didn't stay.

Mr. Koen: I have no further questions.

Cross Examination by Mr. O'Donnell

XQ. Mr. Yates, whether or not you were sitting in this courtroom prior to taking the witness stand? A. Yes.

XQ. And for how long? A. Yesterday and about 3 o'clock the day before.

The Court: Do you think there is anything improper about these witnesses in here? I disallowed a motion to segregate witnesses and I have allowed witnesses to be here.

Mr. O'Donnell: I object, your Honor.

The Court: Well, there isn't any inference to be drawn from that. This is a public courtroom and the doors are open and I have allowed people to come in, whether they are witnesses or not. I don't want the jury to get the impression there is anything wrong about it. I am not indicating anything except that they have a right to be here. Under the Constitution your clients are entitled to a public

trial. There is nothing wrong about witnesses being in here, citizens, men and women. The only ones I would have objection to, Mr. O'Donnell, would be children. I don't like to have children in the courtroom. If children are with their parents and they are old enough, I let them come in. He was listening to witnesses and you have a right to argue that, but the fact that he is in here is a circumstance, and your clients have a right under the Constitution to have a public trial.

Mr. O'Donnell: At this time I wish you would instruct the jury I made a motion for sequestration.

The Court: Any motions you made have no effect, they do not concern the jury or anyone except myself. That is a matter which is within my discretion and I can't believe the day will ever come that any court will say I didn't have the right to do it. I don't want any reference made to any motions you made. You have a right to make them and it was perfectly proper for you to do so. I have saved your rights and the jury is not to draw any inference. Those are motions that are filed. I think I gave Mr. O'Donnell and his associates, I forget how many days in which to file special pleas, as I do in every case. As a matter of fact, I don't think it makes any difference. I think whether I give twenty days or ten days, I think counsel have a right to file special pleas at any time. They have, as far as I am concerned, during a trial, and I will be happy to give them consideration. Go ahead, Mr. O'Donnell.

XQ. Of course, Mr. Yates, while you were in the courtroom on the occasions that you have testified to, you had occasion to observe the person you pointed out as Arnold Campbell? A. Yes.

XQ. And whether or not, Mr. Yates, on the morning of July 18, 1957, when you were about your duties at the bank, you were wearing your glasses? A. I was, yes.

XQ. About the time that you looked at your watch, if I recall, in regard to your coffee break, you fixed that at what time? A. Approximately 5 minutes past 10.

XQ. And at 5 minutes past 10, Mr. Yates, whether or not you can tell us approximately how many customers were in the bank? A. I cannot.

XQ. Well, your best estimate, Mr. Yates. A. I cannot because my back was turned to that area when I looked at my watch.

XQ. So that, Mr. Yates, was it this desk that you were working at? A. That's right.

XQ. And therefore if your back was to the public space area—is that so? A. Yes.

XQ. Do you have some sort of a swivel chair? A. That's right.

XQ. So you were facing generally this side of the bank? A. That is right.

XQ. At the time you walked over to the gate and asked the individual that you met at the gate whether or not you could help, could you fix the time of that greeting?

Mr. Koen: Of that what?

The Reporter: "Greeting."

Mr. Koen: I didn't get that last word. Mr. Penny has furnished it.

The Witness: May I have that again? I have lost it.

[The question is read.]

The Court: The time of what?

Mr. Koen: The greeting.

The Court: Do you object to that question?

Mr. Koen: No, I do not, sir.

A: I do not know exactly.

XQ. I wouldn't ask you exactly, Mr. Yates. All my questions would be predicated on your best estimate. A. I would say several minutes after I had looked at my watch.

XQ. Several minutes after you had looked at your watch?
A. Yes.

XQ. And as a result of the meeting at this gate, did you have occasion to turn around? A. After I was ordered to, yes.

XQ. And when you were ordered to turn around, you were facing, then, where? A. I was facing in the general area of approximately over there. At that angle.

XQ. I assume now your body was completely turned around?

Mr. Koen: That isn't what the gentleman said, sir.

A. No.

XQ. It wasn't. When you say you turned around, will you please tell this Court and jury how you turned around?

The Court: Do you want him to stand up and indicate it?

Mr. O'Donnell: I didn't ask him to stand up.

The Court: Anyway, he can show. Go ahead.

A. When I walked over to this gate, I faced this man here. I let him in and I was ordered to go back to this area, turn around and go back, which I did, and I faced in this direction, going in. When I stopped here—

XQ. Sir, did you physically turn your entire body around in order to do that? A. I believe I did. I don't know which direction, but I did. In other words, I don't recall whether I turned left or right as I turned around, but I did turn around and go back.

XQ. As a result of the order you received from the man at the gate, you turned around? A. That is right.

XQ. But, as you say, you looked at him prior to turning around? A. I did.

XQ. So after completing the turn of your body, you then walked; is that so? A. That is right.

XQ. And where did your walk end in relation to the work

space here on Government's Exhibit No. 5? A. Right here at this corner of my desk.

XQ. And is it fair to say, then, that your back was to the front of the building? A. At a slight angle, yes.

XQ. You tell us now, please, where were you facing when you came to a stop here? A. Toward—

Mr. Koen: I submit he has already answered that twice, [859] sir. My objection.

The Court: He said he said it twice. Hasn't he answered already? I will let him answer again. Go ahead.

XQ. Whether or not this is a complete wall shown here on the floor plan of the Norfolk County Trust? A. It is part wood and part glass.

XQ. Does it extend to the ceiling? A. No, it does not.

XQ. About how high would you place it? A. I would say approximately to my chin as I stand up.

XQ. Were you then facing that partition when you ended your walk from the gate over to here? A. At an angle towards the coupon booth printed there.

XQ. So that if you— A. Approximately, yes.

Mr. O'Donnell: And the coupon book—

The Witness: Booth.

Mr. O'Donnell: —booth, your Honor and ladies and gentlemen of the jury, is at the end of the pointer as I now put it at Government's Exhibit No. 5 to show the angle at this desk where Mr. Yates—

Mr. Koen: I object, I object, I object, sir.

Mr. O'Donnell: —was standing.

Mr. Koen: Is Mr. O'Donnell testifying or is it the witness who is testifying, and I don't think he placed it in the relative position of the pointer, Mr. O'Donnell did. If he wants it, let him ask the witness to do it.

The Court: Don't you think it would be better to let the witness do it?

Mr. O'Donnell: Your Honor, I have been confirming everything with the witness here.

The Court: There is some question about it. I don't know whether you have—

Mr. O'Donnell: Your Honor, all I want to do is exercise my right of cross-examination.

The Court: That's right. You have a right— You should exercise your right of cross-examination, but you should permit the witness to indicate the angle of the direction.

Mr. O'Donnell: The record will show I have yet to fail in that respect.

The Court: You have just pointed it out; is that your objection?

Mr. Koen: My objection is the right of cross-examination does not embrace the right to testify.

Mr. O'Donnell: The right of cross-examination— I placed it for the record—

The Court: Mr. O'Donnell, what you said was this: "Your Honor, Mr. Foreman and gentlemen of the jury, I am now showing the angle," so you are really testifying.

Mr. O'Donnell: Very obviously—

[861] The Court: Mr. Koen questions that.

Mr. O'Donnell: I very clearly referred to Government's Exhibit No. 5 and I would say the coupon booth, from where the jury is sitting, is something that you would necessitate for the record that I point it out.

The Court: You may be right, Mr. O'Donnell, but don't you think the one that is familiar with it, the assistant manager, could point it out better than you, myself, or anybody else?

Mr. O'Donnell: That is anticipating me. I intend to go into that.

The Court: He says you are pointing it out and the witness hasn't said that. I am not saying whether the witness

has. In order to settle the dispute, why not let the witness tell you now what the angle is?

Mr. O'Donnell: That is my question, your Honor.

The Court: I don't want to get into an answer which will lead to another answer. I don't want to interfere with the jury going to luncheon. I think this clock is a little bit slow. I will have you come back at quarter-past two.

[Luncheon recess.]

The Court: I think we have to wait a little while, gentlemen. The witness will be here in a few minutes. I know the reason for the delay.

[A brief pause.]

The Court: There he is.

FRANCIS L. YATES, Resumed

Cross Examination by Mr. O'Donnell, Continued

The Court: Would you like to have the last question read?

Mr. O'Donnell: No, thank you, your Honor.

XQ. Now, Mr. Yates, generally speaking in regard to this entire area, it is a small area, the bank?

Mr. Koen: I object, may it please the Court. "Small area."

The Court: I don't know whether it is large or—this is the old bank, isn't it, before the jury? The jury didn't see the bank?

Mr. Koen: Yes, they did, sir.

The Court: The only changes were outside?

Mr. Koen: The exterior, yes, sir.

The Court: You were out there, weren't you?

Mr. O'Donnell: Yes.

The Court: Why don't you leave out the word "large". What is the question?

[The question is read.]

The Court: I will let him answer.

Mr. O'Donnell: Government's Exhibit No. 5, the floor plan.

Mr. Koen: You may answer, sir. The Judge said you could answer.

XQ. No, the entire floor area of the bank, as such. A. It is a small area, yes.

XQ. And, therefore, from the desk you were working at on July 18, 1957, to the gate, what would be your best estimate as to the distance from the point shown on Government's Exhibit No. 5 at the third desk to the gate?

A. I would say between 12 and 15 feet.

XQ. 12 and 15 feet? A. Approximately, yes.

XQ. And from the desk to the gate, facing back to the back of the bank? A. To that gate there, 3 feet, 3 or 4 feet.

XQ. 3 or 4 feet? A. Yes.

XQ. And now, Mr. Yates, on the morning in question when you greeted the man at the gate here, asking him if there was something you could do for him—is that a fair statement? A. "May I help you," yes.

XQ. You then turned around, that's so, isn't it? A. After he ordered me to do so, yes.

XQ. And after you received that order, would it be fair to state that you immediately turned around? A. After I let him in, yes.

XQ. Well, did you receive the order before letting him in or after letting him in? A. Before letting him in.

XQ. So your testimony now is, the man at the gate here, the first thing he said to you, is it, "Turn around"? A. Not the first thing he said, no.

XQ. So the first thing was "Open the gate"? A. The first thing was, in substance, "This is a holdup—" or "Stick up," I don't remember the exact words.

XQ. Can you recall at any time being asked to open the gate? A. He asked me to let him in. Or told me to.

XQ. And you did that by what method? A. Reaching

down and opening the—turning the latch on the inside, the work space side of the door.

XQ. Will you describe the man you saw at the gate?

A. He was approximately my height, not quite as tall, negro, a sort of protruding chin, I would say, to use that word, and my recollection was a mustache and a receding hair line.

XQ. Whether or not he had anything on his head? A. He did not.

[865] XQ. And whether or not at the time you first viewed him his face was covered? A. It was not covered.

XQ. Whether or not you saw anything else besides the individual you have just described at that time when you walked up to the gate? A. I do not recall seeing anyone.

XQ. So, then, it is your testimony at this moment you recall the one individual you have just described at the gate? A. That is right.

XQ. Whether or not at the time at the gate you can tell this Court and jury if you know where Mrs. Milligan was? A. Not at that time, no.

XQ. After opening the gate and turning around, you say you took a position back approximately here? A. That is right.

XQ. Whether or not, moving over the space to here, you had occasion to turn your head back and look at the entrance? A. I believe—I am trying to recall. As I stood in that position—as I got to that position. I remember—

XQ. So, my question is this: whether or not, as you moved from the gate over to this position that you have told us about near the desk, you had occasion, while you were moving, to turn around and look back at the entrance? A. I believe I did, yes.

[866] XQ. And can you tell me if you know, at what point while you were moving across the floor that you turned around? A. I would say approximately half way.

XQ. And when you turned around, sir, I assume—would you say you saw the man behind the gun? A. Let me clarify turning around. I was still walking and turned my head rather than my body as I moved.

XQ. Did you hear my question as to what your observation was? When you turned around half way— A. My observation was there—

XQ. Did you see the man you have described seeing at the gate? A. I saw the outline and his gun in his hand moving me forward to that position.

XQ. Whether or not, when you turned around at that time, you had an opportunity to observe his face? A. I did not look at his face.

XQ. So your answer is you did not observe his face? A. I saw it in a general area but not pointed to his face.

XQ. Whether or not, when you turned around halfway between the gate and the desk, you looked at the man's face? A. I saw it.

XQ. Now your testimony is that you saw it? A. In the manner in which I describe it, I saw him as a general figure with the gun in his hand.

XQ. Sir, whether or not you can state the clothing that the man had on? A. He had on a light-colored Tee shirt and khaki—light colored chino pants.

XQ. When you say light colored Tee shirt— A. Whitish.

XQ. —would you change your testimony if you were told that other witnesses have described the shirts, in addition to a blue suit, the shirts as sports shirts or work shirts?

Mr. Koen: I pray your Honor's judgment.

The Court: I will exclude that.

Mr. O'Donnell: Objection.

XQ. Does that proposition of a sport shirt—

The Court: Mr. Attorney, you are assuming that the witnesses have testified to that. I don't know whether they have or not. I dislike to limit you on your cross exam-

ination. You maintain that the witnesses have testified to that?

Mr. Koen: I don't maintain any such thing, but I don't think this witness should be required to evaluate his testimony in connection with what others have testified to.

The Court: I think I will permit it. He can answer it. It is cross-examination. If he can.

Mr. Koen: Will your Honor listen to the question read back?

The Court: Yes, I will.

[The question is read.]

Mr. Koen: I pray your Honor's judgment. The question is not correct. There has been no testimony that a sport shirt was worn by the man with a blue suit. My objection, sir.

The Court: I think I will exclude the question.

Mr. O'Donnell: Objection.

XQ. Now, Mr. Yates, how long were you in the position here near your desk? A. The entire time from first being put there until we went into the vault, I would say—

XQ. Now, how much time would that be? A. My best estimate would be 7, 7 or 8 minutes, somewhere around there.

XQ. Is it fair for me to say that you have testified that the position you were facing was in the direction of the coupon booth? A. In that direction, the coupon booth, safe deposit, yes, in that direction.

XQ. Was that a fair statement for me to make? Would you confirm it as being fair?

Mr. Koen: My objection to that type of question, sir, is it a fair statement for him to make?

The Court: I don't know. You see, the difficulty is I don't know what the word "fair" means.

Mr. Koen: Neither do I.

The Court: "Accurate," I will permit that.

XQ. So now, Mr. Yates—

Mr. Koen: May the question and answer be stricken, if there was an answer?

The Court: Yes.

Mr. O'Donnell: Objection.

XQ. Mr. Yates, you were standing here and, according to your testimony now, facing generally toward the coupon booth and the vault? A. Facing the coupon booth and the back end of the vault, to the left rear.

XQ. I am going to ask you if you will, Mr. Yates, to describe to the Court and jury how you were facing in relation to this floor plan, Government's Exhibit No. 5. A. I was here, and I recall we have our Recordak machine here. I was facing looking at that Recordak which, in line of view, would be in this position right here.

XQ. How did you hold that pointer? A. [Demonstrating.]

XQ. And then you would go to the rear of the vault? A. Correct.

XQ. You assumed that position for several minutes? A. Yes.

XQ. While you were in this position, Mr. Yates, whether or not, until you entered the vault you had occasion to turn your entire body around and face toward the front of the bank? A. I did so when the phone rang and was ordered to answer the phone.

XQ. So at that point of the phone ringing, will you now point to the place on the floor plan where the phone was located? A. On this desk, my desk where I was working.

XQ. How did you approach it? A. By turning around in my spot and answering it. I did not reach that—

XQ. Did you travel on this side of the desk? A. No, right here.

XQ. You traveled on this side of the desk? A. To the desk and to the phone.

XQ. On the side of the desk where the chair is? A. That's right, in between the chair and the desk, to answer it.

XQ. And you came back to— A. No. This desk is up against the radiator; an enclosed radiator here. You cannot get around here. I went from here to this chair to answer the phone.

XQ. And you reached over? A. And reached over, yes.

XQ. So that at the time you came to the desk and reached to the phone, whether or not you had occasion to view the person that you say you saw at the gate? A. I did not look at him, directly.

XQ. You then completed with the phone, finally, as you said, [871] no one on the line; is that it? A. That is right.

XQ. So you returned, did you, to this position? A. That's right.

XQ. And was your view generally the same as you described previously? A. Yes.

XQ. About how long a desk would you say that is? A. Oh, approximately 30, 36 inches.

XQ. 36 inches? A. Somewhere around there, yes. A good-sized desk.

XQ. At some time you observed an individual jump the partition? A. That is right.

XQ. How would you place that time in relation to the phone call? A. That was after the phone call. It was, in my recollection.

XQ. Whether or not at that time, while you were standing in the position you have described, you had occasion to see Mrs. Milligan? A. Yes, I did.

XQ. And was it before or after the phone call? A. As I recall it, both times.

XQ. When was the first time you saw Mrs. Milligan following meeting the man at the gate? A. When I arrived at the position I was put in.

XQ. While you were in this position, where did you

observe Mrs. Milligan? A. May I show you? Right in this area here.

XQ. And were other people there? A. Yes.

XQ. How many other people?

The Court: Mr. O'Donnell, would you mind, for the record, having him indicate— He said said "Right in this area here." The stenographic notes won't indicate where that is. Would you mind having him do that?

Mr. O'Donnell: Not at all.

The Witness: That is the area between the gate at the partition and the Recordak machine, which is right here on a table.

XQ. And that would be the gate that leads from the office space in behind the tellers' area? A. From the officers' space to the tellers' area, yes.

XQ. You recall seeing her then. So that up until the time you entered the vault, whether or not, sir, you had occasion to change your position following the telephone call? A. I didn't change my whole position. When the man whom I let in at the gate knelt down to take a bag, a paper bag, out of his briefcase, I turned my head enough to glance down at what he was doing.

XQ. So that after the telephone call, while you were standing here, did you move from that space?

A. Only when I was ordered to go in the vault.

XQ. Only when you were ordered to go in the vault?

A. That's right.

XQ. So that during that period of time your testimony now is that you did move your head and swing from the trunk, so to speak? A. No, I didn't. I just moved my head.

XQ. So that when your testimony about the person reaching down for a bag—is that so? A. That's right.

XQ. Would you now place the person that you referred to, where he was at the time? A. The filing cabinet here, the filing cabinet—the first filing cabinet at this inside

gate, the other filing cabinet at the entrance gate to the officers' space, he was crouched between the two, right against, or—against this wall here. The partition, I should say.

XQ. As I point to this Government's Exhibit No. 5, you place a filing cabinet here? A. Right.

XQ. And a filing cabinet here? A. Right.

XQ. How much distance would you say, in your bank, how much space would you say there is between the two filing cabinets? A. I would say three or four feet.

XQ. Now, Mr. Yates, when you turned your head, at that time whether or not you took a complete view of the individual you have described? A. I saw what he was going. My attention was directed more to that than to the person in general.

XQ. Whether or not at that time, sir, you can recall anything covering the face of the individual between the two filing cabinets? A. At one point at the time I was in there—

XQ. Sir? A. Yes.

XQ. My question is, whether or not at that time that you have told us about you can recall whether or not that individual between the filing cabinets had anything covering his face? A. Not at that time.

XQ. Now, sir, would you say that the view you made by turning your head at that time, you say you concentrated on what the individual was doing? A. Yes.

XQ. And would you say that was a long view you had of him? A. Well, I can see him crouched doing that, yes, sir.

XQ. How would you estimate the time for that? A. 3 or 4 minutes or so, perhaps, after I let him in.

XQ. 3 or 4 minutes or so after you left him in? A. After I let him in, yes.

XQ. And the extent of time used for the turn of your head to look over at that act of reaching for the bags?

A. Well, I don't know. Perhaps 30 seconds. The length of time it took him to unzip it and take it out.

XQ. Mr. Yates, when you passed from the position that you more or less maintained after answering the phone call, would you indicate to this jury the view—the walk that you took to the vault? A. The walk that I took to the vault? I went from here through this gate, along this passageway, through this passageway and directly into the vault.

XQ. If you could, now, sir, estimate the time it took you to cover that distance? A. Well, in ordinary—just a slow walk, because others were ahead of me.

XQ. The time on that date, Mr. Witness. A. Oh, 30 or 45 seconds, perhaps.

XQ. And it took you 30 or 45 seconds to cover that area, how long did it take you when you left your desk and walked over to the gate when this person you have identified as coming in at the gate— A. Well, I don't know. That is something I have never given much attention.

XQ. Your best estimate of the time, working in there the length of time you had, and so forth, on that date, that it took you coming from behind the desk up to the date? A. Oh, 5 or 6 seconds, perhaps.

XQ. And after arriving up at the gate and getting the order to open the door, how much time after arrival at the gate and getting the order to open the door, prior to turning around and going back to this position? A. I don't know, sir, as I could estimate that.

XQ. I asked you, didn't I, Mr. Yates, and it may be repetitive, but will you tell me now at the time that you place this occurrence, how many customers were in the public space of the bank? A. I could not tell you.

XQ. As you traveled from this position over into the vault, whether or not, walking along there you had occasion to stop at any time? A. No.

XQ. Whether or not, as you walked along, you had occasion to turn your head? A. I did not.

XQ. So that from the time that you left here until you entered the vault you didn't turn your head? A. I don't recall doing so, no.

XQ. So that as you were passing along through this area here, going toward the vault, whether or not, sir, you observed the public space? A. I don't recollect observing that public space.

XQ. Whether or not, as you walked along—did you say, incidentally, that you were one of the last individuals to enter the vault? A. I was.

XQ. So, sir, with that in mind, as you walked along here, whether or not any employees of the bank were still in this tellers' work area? A. They were not. They were ahead of me.

XQ. And, sir, whether or not, as you walked along here, there was anyone in the tellers' work area? A. I did not notice.

XQ. And whether or not in the public space area—you said you didn't notice the public space area? A. I did not recollect seeing anyone in that area.

XQ. So that from the time you were ordered to leave this point here near the desk, until you entered the vault, not turning around—correct? A. I do not recollect turning around.

XQ. During that time is it fair to say that you didn't observe this man that you have described as being between the filing cabinets? A. To the best of my recollection I did not, once I was ordered to go into the vault.

XQ. So that, Mr. Yates, your testimony is then, the seconds it took you to walk to the gate, you had an observation then? A. I did.

XQ. And a type of observation when you came back to answer the phone? A. A type, yes.

XQ. And another one out of the corner of your right eye when you described reaching toward the bag? A. That is right.

XQ. So, does that sum up, sir, your observation of the individual that you have described as benign between the filing cabinets? A. At this moment I believe it does.

[A brief pause.]

[A brief recess.]

The Court: If anyone feels disposed to ask for a recess at any time, it is perfectly all right. That applies to counsel, too.

[Conference at the bench:]

Mr. O'Donnell: The defense is requesting the statements of this witness under Public Law 85, 269—

The Court: For the reason I have already given, I will deny it. It has been expressed fully in connection with the last witness.

Mr. O'Donnell: All right.

The Court: If you lay the proper foundation I will order them produced, but you haven't laid it.

Mr. O'Donnell: All right. Now we ask for the gentleman's request to Mr. Koen, you hand them, of this witness.

Mr. Koen: I have no statement made by this witness.

The Court: That is a responsive answer.

Mr. O'Donnell: All right.

The Court: I want to say to you now, gentlemen, if you get those statements under that condition, they have to become admissible.

Mr. Koen: If he means a statement prepared and signed by this witness, then I have no statements.

Mr. O'Donnell: I want to make it perfectly clear I am requesting statements given by this witness, in interviews with FBI agents.

The Court: Suppose he got a statement in the Grand Jury. Are you entitled to it then?]

The Court: I want it understood I am not denying you that right. You lay the proper foundation and I will order it, but it hasn't been done at the present time. I will carry out the mandate of Congress as I interpret that Act, and I think I know the Act fairly well because I made a little bit of contribution to it in a minor way. My opinion was sought.

XQ. Mr. Yates, whether or not, as a result of your experiences July 18, 1957, you had conversations with FBI men; yes or no? A. I did.

XQ. And your interviews commenced, did they, July 18, 1957? A. I believe they were FBI men, yes.

XQ. Would you know that fact, Mr. Yates? A. Yes, they were.

XQ. All right. And that occurred on July 18, 1957? A. That is right.

XQ. Whether or not, sir, they identified themselves by showing credentials? A. They did.

XQ. Whether or not you read their credentials?

The Court: Do you mean "read"? They don't have to read credentials.

Mr. O'Donnell: It is fundamental if someone shows you credentials, you look at them.

The Court: He says he is an FBI agent, and if they question it, he shows his badge. He says he talked to the FBI agents; is that right?

The Witness: That is right.

The Court: There is no dispute over it.

XQ. Whether or not you were shown credentials? A. I was.

XQ. A card, weren't you shown a card? A. Yes, that's right.

XQ. Whether or not you read the card? A. I didn't read it in its entirety.

XQ. Did you read it, sir, as such? Did you read the card you were shown? A. To the best of my recollection I do not remember the gentleman, but I was told that this particular man would take my testimony.

XQ. What was his name? A. If I am not mistaken, Frisoli, or something of that nature.

XQ. Does this help your memory: Leonard Frisoli? A. He was a short, dark man. I think Frisoli; yes, I think so.

XQ. And you had a conversation with him about the incident on July 18, 1957? A. That is right.

XQ. And he reduced what you told him to writing; that's so, isn't it?

Mr. Koen: Wait a minute, please. I object.

Mr. O'Donnell: When Mr. Koen objects, don't answer. I am not looking for a quick answer.

The Court: Let me hear the question.

[The question is read.]

Mr. Koen: If he knows.

The Court: If he knows.

The Witness: Shall I answer?

The Court: Yes; if you know.

A. He was writing as I was speaking.

XQ. Now, sir, when you completed your narrative of the events to Mr. Frisoli, whether or not he had occasion to read them back to you? A. I believe he did, yes.

XQ. And at that time, did you tell him what he read back to you was a fair statement of what you had stated to him? A. I believe I did.

XQ. Now, sir, whether or not following July 18, 1957, you had a further interview with any FBI agent? A. Would you explain that a little further, as to what you mean by "interview"?

XQ. Did you meet an FBI agent after Leonard Frisoli?

A. Yes.

XQ. What date was that? A. I don't recall the date.

XQ. Your best estimate? A. Within several days after the incident.

XQ. Was it at the bank? A. It was.

XQ. Whether or not you related to him a narrative of your experiences on July 18, 1957? A. I'm slightly confused on some of the events in my mind. I don't recall exactly, at that time.

XQ. And whether or not you remember his name, sir?

A. I don't recall his name at the moment. I can see him, but I don't recall his name.

XQ. Did you see him in the courtroom yesterday?

A. No. No.

XQ. Have you seen him in this building? A. I don't recall seeing him in this building, no.

XQ. And, sir, how many—on how many occasions—if only one, say so—on how many occasions did you see this agent, the one after Mr. Frisoli? A. The exact number—I would say several.

XQ. So that is it fair to say in the several meetings you had that the narrative of your experience on July 18th was talked about? A. Yes.

XQ. And, sir, whether or not on these several occasions, the fact that on several meetings with this individual, does that help you in any way to remember his name? A. Those meetings with this individual were in most part to view pictures of individuals, but nothing else.

XQ. I have been coming to that. A. Nothing else.

XQ. So, sir, the fact of the several meetings does not assist you in remembering his name? A. It does not.

XQ. In addition to that individual agent, on several meetings, and Mr. Frisoli, did you have any other con-

versation with an FBI agent? A. Other than those two individuals?

XQ. That is my question. A. Yes.

XQ. And how long after the event of July 18, 1957, did you have that conversation? A. I don't recall.

XQ. Your best estimate, sir? A. I don't believe I can answer that with a definite answer.

XQ. Would you place it in the month of September? A. I wonder if perhaps I have confused the issue a little bit in what you are trying to get at.

XQ. Just my question, sir, that's all.

The Court: He says he is confused. He doesn't understand.

Mr. O'Donnell: He said, "What I am trying to get at."

The Court: He says he is confused. What he is trying to get at—you are confused as to how to answer his question; is that what you mean?

The Witness: That is right, yes.

The Court: Mr. O'Donnell is entitled to take your answers.

The Witness: As far as the incident was concerned, my only recollection is discussing it in full with Mr. Frisoli.

XQ. Now, sir, my question is, can you tell me the time when you met the third FBI agent and I asked if it could be in September of 1957? A. It could be.

XQ. Can you remember that man's name? A. I had talked to a—

XQ. Sir, the question is, can you remember— A. Yes, the name. Mr. McGillicuddy.

XQ. John McGillicuddy? A. I don't know his first name.

XQ. With Mr. McGillicuddy, how many times did you meet with that gentleman? A. I saw him on several occasions.

XQ. How would you best estimate the number of times? Your best estimate, sir. A. Three or four times, perhaps.

XQ. And you discussed the narrative of your experience on July 18th while you were working; that's so, isn't it? A. No, it is not.

XQ. Did you discuss anything in relation to your experience of July 18th with Mr. McGillicuddy?

Mr. Koen: May we have a yes or no answer to that, sir?

The Court: Yes.

The Witness: May I have the question again?

Mr. O'Donnell: Please, Mr. Stenographer, will you read the witness' question?

[The reporter complies.]

The Witness: Perhaps I don't know how to answer that, sir, in respect to the way you wish it.

Mr. O'Donnell: I don't think the witness could know how I wish it.

The Witness: No. May I—is it out of order to say anything?

XQ. Mr. Witness, here is the question: It is fair to say, of course, that in the absence of that occurrence of July 18th, you have described on the witness stand, that, of course, you would not meet Mr. McGillicuddy; that's right? A. That's right.

XQ. So that as a result of meeting him, isn't it fair to say you discussed some things in relation to the incident of July 18th? A. Some things, yes.

XQ. And with Mr. Frisoli you discussed it entirely, all aspects of it; that's so, isn't it? A. That is right.

XQ. And with Mr. McGillicuddy you discussed different phases of it; that's so, isn't it? A. In part, yes.

Mr. O'Donnell: Your Honor, the defense now makes a demand for the statements—

The Court: Inasmuch as you have made it in the pres-

cence of the jury, I am going to interrogate this witness in the presence of the jury. Mr. Witness, you say you talked to Mr. Frisoli on the 18th day of July; is that right?

The Witness: That's right.

The Court: And that was sometime after this holdup; isn't that right?

The Witness: That's right.

The Court: And that took place—

Mr. O'Donnell: It was the same day, your Honor.

The Court: That's right. That took place out in Canton; didn't it?

The Witness: It did.

The Court: An FBI agent by the name of Frisoli came to the bank?

The Witness: Yes.

The Court: And he talked to you?

The Witness: Yes.

The Court: And you made an oral statement to him, didn't you?

The Witness: I did.

The Court: And you didn't make any written statement, did you?

The Witness: No, none.

The Court: And you never signed a written statement?

The Witness: No.

The Court: While he was—while you were talking to him he was making notes; is that right?

The Witness: He was.

The Court: Is that the reason why you told Mr. O'Donnell that the notes were read back to you, because you assumed he was writing down what you said?

The Witness: That is right.

The Court: He didn't read it back to you, did he? Did he read back after you finished making your statement and he finished writing his notes?

The Witness: I believe he did.

The Court: You believe he did?

The Witness: Yes.

The Court: I think counsel is entitled to have a production of that statement, Mr. Koen.

Mr. Koen: May I be heard on it at the bench, sir?

The Court: Certainly. Come up.

[Conference at the bench:]

The Court: One of things I have in mind is this, as I understnad this statute. I have got it in front of me some place and I have been over it again with Mr. Hurley a dozen times. I understand that what Mr. O'Donnell expects—he says he is entitled to this because the Act gives him the right to have it on the basis that it might well be helpful as affecting the witness' testimony. Now, obviously if the ground work has been laid, the defendant must move for its production before it is produced.

Mr. Koen: Ground work for what, Judge?

The Court: For the production of the [889] statement. When it is produced it is my obligation to examine it first and to excise extraneous matters. That is only what the government claims. In addition to that, he says the statement— As I read this Act, and we went over it pretty well together, there must be some evidence that the witness made a written statement, that he either signed it or adopted it or approved one. He says an oral statement was taken down verbatim. Taken down contemporaneously with the time that he made the statement, and he said it was read back to him. If that was read back to him, then obviously it becomes a statement that certainly comes within the purview of that Act.

Mr. Koen: No, it doesn't, Judge.

Mr. Hubley: He didn't say a statement.

Mr. Louison: He said he approved its contents, also.

Mr. Hubley: He said a man was taking notes.

The Court: And he had it read back to him.

Mr. Koen: Those notes. Those notes were transcribed and what we have is a report of that interview. I don't think that is a statement covered by this statute, Judge.

The Court: I am afraid it is.

Mr. Koen: I am afraid it isn't.

The Court: It says "substantially verbatim".

Mr. Koen: But there is no evidence to indicate what I have in my possession is substantially verbatim with what the witness said and, furthermore, Judge, I think that in these cases a greater foundation must be laid than the one that has been laid by Mr. O'Donnell.

The Court: I will take this matter under consideration and I will make my ruling tomorrow or Monday on it. I think I understand it. If you have a memorandum, you can give it to me.

Mr. Koen: I have one downstairs.

The Court: As it strikes me, he isn't entitled to have it presented to him, but it is to be presented to the Court.

Mr. Koen: That is not the way I understand it. I don't think this document is the type of document covered by the statute.

The Court: He says when he finished taking notes, he said it was read back to him.

Mr. Hubley: The agent, of course, would check back his notes to make sure he got it accurately.

The Court: If it is substantially verbatim, and he says it is. Will you show—is there any way the man could have his memory refreshed?

Mr. Koen: Why would I have to refresh his memory?

The Court: I have to rule on this.

Mr. Koen: I am satisfied, and if they think for one minute he is now making statements inconsistent with his prior statements, let them lay the foundation on that basis.

The Court: Why isn't he?

Mr. KOEN: I think the short answer is the man is telling the same story now he always told.

The Court: That isn't the test. The test is whether or not he made a statement, either in writing or a statement orally, which was substantially verbatim, and I have asked him these questions.

Mr. Koen: This document I have, Judge, I tell you is a report of an interview, and it doesn't pretend to be a substantially verbatim report of what this witness said.

The Court: The only trouble is, I asked the witness, and the witness said it was.

Mr. Koen: I don't think that that phrase was used, Judge.

Mr. O'Donnell: Mr. Koen, for that matter you can get the actual report of Mr. Frisoli.

The Court: I will reserve on this and decide tomorrow morning. Come over, Mr. Yates.

Mr. O'Donnell: Your Honor, so the record will show, at this time, in addition to a demand or a request under the statute, I am also making a common law demand—

The Court: I am not recognizing that.

Mr. O'Donnell: — for all documents.

The Court: We are trying to settle one thing at a time. Congress passed an Act which was passed as a result of a decision in the case of United States

versus Jencks. The Act was only passed and has gone into effect within the last four or five months, and obviously it has not been interpreted. I asked you—Have you a clear memory of what you said that day to that—

The Witness: Can I answer in my own words?

The Court: Yes, you can.

The Witness: My recollection, very briefly, is sitting down at my own desk, relating to Officer Frisoli, whatever his title is, the events as I remembered them that day.

The Court: Let me ask you this: Can you remember now that the notes that he took down, as you say they were read back to you—do you remember them being read back to you; do you remember that?

Have you any memory of that?

Mr. O'Donnell: He has testified he did.

Mr. Koen: Wait a minute, please.

Mr. O'Donnell: Mr. Koen, don't raise your voice to me.

The Court: I am asking this question now.

The Witness: I remember—I am trying to recall the picture. I remember him at my desk and seated and talking, and to the best of my recollection I am pretty certain he read them back.

The Court: Was it substantially verbatim, what you said to him?

The Witness: The essential facts.

The Court: No, I mean, was it substantially verbatim. Whether that was in substance, almost word for word, what you said.

The Witness: He read what he had written. Whatever I said to him he was writing down.

The Court: Would you like to have your memory refreshed on it so as to answer that question in the

morning? Would you? I am going to admit it, Mr. O'Donnell.

The Witness: I am saying what I feel that I can recollect, to the best of my ability.

The Court: Can you say that was substantially verbatim as it was read back to you? "Verbatim" means, was it substantially word for word what you told him?

The Witness: The main part of my recollection is telling him. The other seems to be that he did read back what he had written.

The Court: Was it substantially verbatim, what you told him, not what he read back to you? Having in mind what you told him, was it substantially verbatim, what you told him? I think I will let you decide tomorrow morning. I want it answered— He is a decent man that will answer it honestly. If you can say it is substantially verbatim, I know you will say so. I will let you think it over until tomorrow. I am disposed to have that statement shown to me.

Mr. Koen: Do you mean you want me to show the statement to Mr. Yates?

The Court: No, he said he was about to say but he has been hesitating. I don't want this gentleman to be answering questions put to him that way because he is a good citizen. I want to give him a chance to answer it, and you give me your answer as you remember it.

Mr. O'Donnell: I think the best time for the answer is now.

The Court: I don't think so. The man said he doesn't know. He has taken a negative position. If it is your considered judgment and memory that it was read back to you and that what was read back

to you was verbatim—was substantially verbatim, what you said—you let me know tomorrow morning.

Mr. O'Donnell: I object at this time because I think it violates the defendants' right of cross-examination and I think it violates their right of confrontation.

The Court: All you are entitled to in that statement is that. If it is produced, it is to be turned over to me.

Mr. O'Donnell: The record should show that the witness is now off the stand and he is being suspended with.

The Court: I am going to give him some time to think it over, and you let me know in the morning. Would you prefer, it that way or answer it now?

The Witness: I would prefer to settle it in my own mind.

The Court: Would you like until the morning?

The Witness: I would.

Mr. O'Donnell: I object.

The Court: I will suspend further cross-examination with this witness until tomorrow morning, and Mr. Koen can call the next witness.

Mr. O'Donnell: I object.

The Court: What are you objecting to, Mr. O'Donnell? Object, object, object. There is no objection to this.

Mr. O'Donnell: There is a legal objection.

The Court: There is not an objection in the world. I want no further comment. The man has asked until tomorrow, and he can have it.]

The Court: That is a preliminary question of law I have to settle first. We will settle it in the morning.

Statement by the Court

Now, Mr. Foreman and ladies and gentlemen of the jury, I want to have you get away before four. I am going to speak of this in open court because I don't want you to go away with the impression that Mr. O'Donnell and his associates did not have a right to demand statements, copies of statements, under certain conditions.

For reasons that are known to judges and others that are familiar with law enforcement, as the result of a decision by the United States Supreme Court, there was an act passed by Congress. It went into effect September 2, 1957. In many aspects it probably wasn't necessary, but so that you will understand:

"Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) to an agent of the government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."

That is exactly the situation with Mr. Yates. He was called as a witness.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce a statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."

As you can readily observe, and I am doing this only because there was a discussion in the court room about it—I don't want you to feel the defendants, through their counsel, were out of bounds asking for it. It is a question which must be settled fundamentally as a question of law for the court.

"If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the Defendant for his use."

And I want you to remember that, so that you will understand just what the law is. The Court has to be satisfied, first, that Mr. O'Donnell had a right to ask for it, he had a right to demand it, and I took the witness up here and interrogated the witness.

If that statement represents, as I feel now about this statute, and I want it reserved until tomorrow—if that statement represents substantially verbatim what this witness, Mr. Yates, told the FBI Agent on the afternoon of July the 18th, and the Government does not claim there is any extraneous matter in the report, then obviously, as I

feel now, if he gives that answer, I want you to know, Mr. O'Donnell, and I want the United States Attorney to know it, and I will give you some chance to think it over and you can argue with me tomorrow morning, as I am disposed now, I am disposed, Mr. O'Donnell, to order it delivered directly to you as the attorney for these defendants. I am disposed to do that, and I am going to give this witness, in the light of what the witness said he wanted—I am certainly going to do that. I don't know of any other way that I can handle this. It is a new statute.

I want it understood you have a right to do that, but I have certain things I have to do first, and I am saying this so that you will understand that I have reserved this decision for a twofold reason: first, to give the witness, Mr. Yates, the right to think it over. You can be sure that he will settle it himself, and if it is that, it will be produced. What it is I am sure I don't know any more than you, but I do think under this statute it should be produced and, very frankly and honestly, it has always been my opinion that it is always in the orbit of the discretion of any judge sitting in the trial of cases to permit opposing counsel to have any statement which might tend to impeach the credibility of the witness. That doesn't mean to show he lied. Which might have a tendency to affect the correctness of the statement that was made. I have always felt that the defendant in a trial of a criminal case should have that.

This is a very efficacious statute because this is a safer way of doing it, and if it is done the other way, the statement would be admissible in evidence, and this protects—it isn't a one-way street, it is a two-way street. It protects the Government and it protects this defendant.

I have only read several sections, so you will understand why I have decided to wait until tomorrow morning. I want the United States attorney to know exactly how I feel about it. I want to square the situation thoroughly with Mr. O'Donnell and his associates and I want you to know he had a perfect right to interrogate the witness for the purpose of showing that the witness made a statement which was read back to him, which was taken down by an FBI Agent and which reflected substantially verbatim what he told.

Mr. Koen: No, may it please the Court, I think that is the question Mr. Yates is going to try to determine tonight and report to you tomorrow morning.

The Court: I want counsel to know this, that if it becomes necessary and there is a voir-dire examination needed, you will understand why I am doing that. I am going to do that so that the rights of these defendants will not be prejudiced.

I think it is very important for a judge sitting in every case to try to refrain from permitting any cancer worm to grow in the trial of cases, and I mean by that things that would sort of affect a person's sense of approach and his ability to diagnose and separate the wheat from the chaff, and make the kind of a decision that is so necessary in these days and which has always been so necessary in the interests of simple justice.

As I have said to you, counsel certainly must appreciate the fact that these are serious charges, and whether they are serious or not, those principles still operate, and the fact that they are doesn't limit or doesn't control or doesn't minimize the obligation that is the judge's obligation. As I told you, cases have to be decided upon premises that I

will explain to you later, and there is an obligation on the part of everybody to approach these things with a sense of fairness and with a sense of obligation to their God and their country to do their duty; each and every person, to do it well and to do it courageously.

There are three men here and they are entitled to get a fair, square shake, and I am going to use very ordinary language. There is an obligation—we must remember there is the sovereignty of the United States to be considered, and those obligations and those tests I will explain to you, I can assure you, without making myself the thirteenth member of the jury. When the time comes, two of you will have to step off, and let's hope, God willing, you will be in fine health when I have to make that choice.

I will not invade the sanctuary that our Founding Fathers set aside for you, because since the birth of the Son of God there has never been one man whose judgment and whose opinion was worth the opinion and the judgment of twelve fine citizens. There are some men that would have you believe that, but that's the kind of an ideology we don't practice here, thanks be to God, so that I will not be that.

I have a right to comment on evidence reasonably, and when I do it, I have to do it in an advisory manner.

I must say to you your memory controls. It is your judgment, it isn't mine. I am saying this only because I want you to feel, as you go away, that this is a matter which has not been settled. It isn't an easy matter to rule on because it is the first time it has been presented to me.

I want to say to the United States Attorney, as I read the statute now, and as I read it in the past—I think I

have said enough about it to let you know that when Mr. Yates comes back tomorrow and gives this some thought, unless you say to me, Mr. Koen, there are extraneous matters in that, I will call upon you to deliver it to Mr. O'Donnell if I feel as I feel now, and I will be happy to hear from you.

I don't know of any precedence. It is a very, very well put together act, and there are some things that make it difficult to understand, but on the whole, as I view it, I give the overall picture, as I view it now, and if I am wrong on any detail, you may call it to my attention tomorrow, Mr. O'Donnell. And, Mr. Koen, if you feel that I am wrong, I will correct it.

Please, I beg of you, go home and refrain from coming to any finality, refrain from discussing it with anybody. Just have a lot of relaxation. This is the night for boiled dinners.

Mr. O'Donnell: I want to say for the records, I feel that the defendants are prejudiced by the delay or not getting the records at this time.

The Court: I don't know why you say that.

Mr. O'Donnell: To clean the stable.

Mr. Koen: Can we have any discussion in the nature of that out of the hearing of the jury, sir?

The Court: I have to answer that. I want you to remember I am solicitous about these defendants, but that last statement of Mr. O'Donnell's is not a fair statement, but please don't charge it up to these defendants.

Mr. Koen: Please don't charge it up to the Government, your Honor. I am the one who hasn't delivered them.

The Court: I am going to make up my mind as to what that law is. I am going to study it again tonight. I have

indicated my point of view only because it was discussed in your presence and I wouldn't want you to have to go home with a mystifying point of view with reference to it.

I very frankly said what Mr. O'Donnell said I had a right to say. As a result of saying that, I am supposed to have done him some harm. I don't know how I have. If I feel as I feel now about it. The gentleman has asked—he said he would prefer to have some time to think it over. The Government has a statement. There are other ways of getting it. I intend—I think that in the light of all the facts and circumstances, I have tried to put it before you fine ladies and gentlemen squarely and without any desire on my part to prejudice the rights of anyone.

Obviously, if you heard a part of it, it wouldn't be right to go home and wonder what it is. It is a simple dispute over interpretation of an act of Congress which has become a part of the statutory law of the United States and which I am trying to interpret in the light of my obligation as judge of this court, free of prejudice and bias, but with a desire to see that justice is served for the United States and for these defendants.

With that admonition I am going to bid you good afternoon and, God willing, I will see you tomorrow morning at 10:00 o'clock.

[Adjournment.]

. . .

The Court: Will counsel please come up. Don't bring the jury down for a minute.

[Conference at the bench, not reported.]

The Court: Now would you come up, Mr. Yates.

[Conference at the bench, at which the following was recorded:

FRANCIS L. YATES, Resumed

The Court: Tell me now—I suggested or, rather, I asked you last night before we recessed for today, Mr. Yates, if in the light of all the circumstances you were desirous of giving some reflection to the question as to whether or not the statement which you say yesterday was read back to you as you remember it, was substantially verbatim what you said. Have you given it some thought?

The Witness: I have.

The Court: What is your answer?

The Witness: My answer is this. My recollection^A is, that I had confused the issue at the moment. I know that something was said, and it is the best of my recollection that at the close it was asked if that was substantially what happened.

The Court: And your best memory is, it is substantially accurate?

The Witness: That is right. But I do not recall clearly, if at all—

The Court: Did you have a chance to have it read to you? Have you had it read to you?

The Witness: No, sir.

The Court: Well, where is it? Have you got it, Mr. Koen?

Mr. Koen: Yes.

The Court: Would you kindly read it back, then? I don't like to do this unless you are willing to do it.

Mr. O'Donnell: I think the record should be clear on that at this time.

The Court: Well, Mr. O'Donnell, what I am trying to do—I don't know why you object to it—I am trying to help you to get it, and I am trying to follow the words of this so as to give you a chance to be heard. But I have indicated I haven't changed my position in what I said last night. I don't know how often I've got to do it.

Mr. Koen: You are referring to the report that was introduced by Agent Young?

The Court: That afternoon.

[A document is handed the witness.]

Mr. O'Donnell: Do you want to identify it?

The Court: Mr. O'Donnell is objecting to it. That's the trouble here.

Mr. Koen: He objects to what?

The Court: To his reading it. How is he going to tell whether it is or not? I don't know how he can tell whether it is substantially verbatim. How can he say it is substantially verbatim unless he has read it?

The Witness: Shall I read this?

The Court: Oh, yes. Let me say this to you. There has been a statute passed by Congress as a result of a decision by the Supreme Court; it is a clarifying act of Congress, defining the method by which counsel for a defendant in a criminal case can properly object to the statement of a witness. The purpose of getting the statement is a very, very laudable purpose on the part of the defendant. Obviously, with any man on trial it isn't a question alone of the truthfulness of a witness, but rather his memory and everything else, and for this reason there is put at an attorney's disposal anything which

might indicate that which would tend to negative or contradict or minimize the statement which was supposedly made on the 18th of July.

The Witness: Yes.

The Court: The afternoon, or the morning of that day.

The Witness: Yes.

The Court: Obviously, at that time I assume it is clear that no one had been arrested. Isn't that right? Now,—

Mr. Louison: If your Honor please,—if I may at this time,—

The Court: Yes, go ahead.

Mr. Louison: Where the definition of a "statement" appears in the statute, it says:

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him."

The Court: Which paragraph are you reading?

Mr. Louison: Section 1,

The Court: That's right. Now go ahead.

Mr. Louison: Now,—

Mr. Koen: I would like to find out, if I may, how this document that I have in my possession fits into that definition which he has just read?

The Court: Yes, that's the question. How can you say he adopted or approved it unless he knows what it is?

Mr. Louison: Mr. Koen now hands us a mimeographed reproduction of the handwritten page. We don't know what it is.

Mr. Koen: You say that is so?

Mr. Louison: Yes.

Mr. Koen: I didn't say anything of the sort.

The Court: Listen—I'll take care of the point.

You think the Federal Bureau of Investigation is inclined to convict people improperly or in an improper way? Do you think that?

Mr. O'Donnell: We're interested in the defense of this case.

The Court: I'm interested in the simple principle of justice that surrounds the obligation of a prosecutor to do his duty, and I wouldn't do such a thing. I would be ashamed to.

Mr. O'Donnell: But I give no presumption to the FBI relative to this—

The Court: I give a presumption to them. They're a wonderful body of men—that's what they are, and I give a presumption to them. I give a presumption to peace officers. I give a presumption to the police department.

Mr. Louison: I would say there was a presumption for these defendants.

The Court: That's right. A legal presumption. That's right. Nothing more and nothing less.

Now, I'm prepared to rule on this. There are only two ways in which it can be done. One is, if you demand it—understand—you are entitled to have it. Now, the other is, under this statute, there's Public Act which is Public Law 85-269, enacted by the 85th Congress, which was adopted September 2, 1957.

Mr. Koen: Title 18, Section 3500.

The Court: That's right. Now, "a written statement made by said witness and signed or otherwise adopted or approved by him". Now you wouldn't question the character of this fine man. No one would. No person could, any more than I would question the stature of you gentlemen.

Mr. O'Donnell: No, but I am entitled to question it in the trial on cross-examination.

The Court: Now wait a minute.

Mr. Koen: You had the opportunity to cross-examine.

The Court: In the last few minutes of your cross-examination you made this admissible, there's not a bit of doubt about it. It was made that way,

and I have to determine whether or not this was adopted by him or approved by him— that's about the size of it. If it was adopted by him or approved by him, obviously then it is substantially verbatim what he said, isn't it?

Mr. O'Donnell: I feel he has already said it was adopted by him.

Mr. Koen: No.

The Court: No, he hasn't said that. He asked last night if he could have some time to think it over. Will you read back his answer, what he said? Well, no need to read it back. Didn't you just tell me, Mr. Yates, that you hadn't read it, your memory was cloudy with reference to some of the phases of it?

The Witness: At that time I think I did.

The Court: That's right. And all it does, it represents substantially what you told the FBI agents.

The Witness: That's right.

Mr. Koen: I think the Court is confusing the two sections of the definition.

The Court: I may be.

Mr. Koen: The words "substantially verbatim" are not used in Section 1.

The Court: That's right.

Mr. Koen: They are used in Section 2.

The Court: That's right. Will you let us get along with this, please?

Mr. Koen: They have taken the position that this

document is a written statement adopted or approved by this witness. Whether it be sufficiently verbatim or not has no application to that portion of the statute, if that is what they are claiming, because it is not either a written statement or the man has never adopted it or approved it in conformity with the statute.

The Court: That's it. Isn't a stenographic statement—it isn't a mechanical statement, it isn't an electrical statement.

Mr. Koen: We can answer that too if we come to it. But they have put it on the basis that it is a written statement adopted or approved by this man, and that is not the fact.

The Court: That's right.

Mr. Koen: He said he has never seen it.

The Court: He has never seen it. Well, he has never signed it, and they've got no written statement, and that's out.

Mr. Koen: And he has never adopted or approved this document which I have in my hand.

Mr. O'Donnell: That's your testimony, Mr. Koen; but according to his—

The Court: No, please.

Mr. Koen: He never said it.

The Court: He never said that. You asked him on the stand directly, you asked him if he thought it had been read back to him. He said that the FBI agent took notes as he went along.

Mr. Koen: That's what was read back to him, not this document.

The Court: That's right. He said it was read back to him; he said; and then I—

Mr. O'Donnell: Mr. Koen has got me wrong. I asked for the document that was compiled on that

day, and he has it available to him, and if he wants to substitute or give me some substitute—

Mr. Koen: What document?

Mr. O'Donnell: I'm asking for the United States to produce that document.

Mr. Koen: What document was made on the 18th day of July and I can't find it? You tell me. What document do you say was made on the 18th day of July?

The Court: He said you had it available.

Mr. O'Donnell: You had it available.

Mr. Koen: I don't have any document available except the one I'm talking about, and that was not made in the bank on July 18th.

Mr. O'Donnell: Then get the original.

Mr. Koen: I will not go and get it.

Mr. O'Donnell: That's what the statute indicates.

Mr. Koen: I will not go and get it. This is the only document I have; it is the only document in the files that were sent over.

The Court: It's available to you. You know who the FBI agent is. Bring him in.

Mr. O'Donnell: It's in the possession of the United States.

The Court: It's available to you. You know who the man is.

Mr. O'Donnell: It's in the possession of the United States.

~~Mr. Koen:~~ He asked for a specific—

Mr. O'Donnell: It's in the possession of the United States.

Mr. Koen: He asked for a specific document that he has I do not have, nor does any agent have in his possession. If it is a specific document and that's what he wants, that's what I handed to

you. If he's just talking about notes that were made on the afternoon of July 18th in the Canton Branch, I do not have them nor does any agent of the FBI have them.

Mr. O'Donnell: What did they—burn them?

The Court: Oh, no. Say, listen,—

Mr. Koen: Don't be flippant.

The Court: Say, listen!

Mr. O'Donnell: You say the FBI don't have them?

Mr. Koen: That's what I said.

The Court: Let me say something. I've safeguarded these defendants' rights more than you fellows have; but I'm going to safeguard the United States of America, too.

Mr. O'Donnell: I know you have.

Mr. Koen: When I make a representation in this court, I'm not—

The Court: Listen, please. I'll take charge of the case and I will handle the case as I think it ought to be.

Mr. Koen: If a specific document is asked for and I don't have it and nobody has it, I don't think you or anybody else can require me to produce a nonexistent document.

The Court: That's right. You said there isn't any document.

Mr. Hubley: That's right, your Honor.

The Court: What?

Mr. Hubley: That's right.

Mr. O'Donnell: No record of that interview was handed back?

Mr. Koen: That isn't what you asked for.

Mr. O'Donnell: That is what I asked for.

The Court: No, he said he hasn't it obviously. Listen, Mr. O'Donnell.

Mr. Koen: The document that you said—

The Court: Wait a minute.

Mr. Koen: The document that you asked for—

The Court: Wait a minute. You know it's a little piece of paper that was copied—I understand.

Mr. Koen: There's a difference—

Mr. O'Donnell: I don't think that's so.

The Court: I'm not going to put that flag at half-mast with every bureau, in the situation where you've got two men that have already been identified positively.

Mr. O'Donnell: I object to that statement.

The Court: And in the absence of the jury that statement stands.

Mr. O'Donnell: And I ask for a mistrial as a result.

The Court: No mistrial. You would never get it. It's for the jury to say whether the men are right or not.

Mr. O'Donnell: There are witnesses in the courtroom.

The Court: There's nobody here. Let me tell you something. There's nobody here.

Mr. O'Donnell: There are Government witnesses in the courtroom.

The Court: What you have been doing, I am going to say frankly now that you are the meanest fellow that I have seen in my courtroom, and you have little consideration for what I consider the amenities that should exist between your sovereignty and your obligation as a lawyer, and you continue to do it. I have done my best to protect these men from all forms of prejudice, and I have succeeded in doing it. And I'm saying this: that the juries are finders of the fact. I'm not going to tell any jury what to

do. When I get through with my charge there will be no suggestion of prejudice on my part. You are making accusations against the finest body of men that ever drew the breath of life.

Mr. O'Donnell: I'm just saying I put no presumptions in their favor; the only presumption is in favor of the defendants.

The Court: I put the same presumptions in their favor I put in favor of your clients. Your clients are presumed to be innocent until they are found guilty. Every man is presumed to be free from the imputation of wrongdoing unless there is some evidence to prove it. How would you like to have a charge put on you, or myself, for example, and a charge made. That's the situation.

Mr. O'Donnell: That's cross-examination. The essence of cross-examination—

The Court: I know more about the essence of cross-examination than you'll ever know. I tell you that right here. I want to get on with this trial. You have used up a lot of useless time. From now on the Federal rule on cross-examination will be applied. It will be limited to what is brought out on direct. I am going to go along with this. This case was put down, and I'm going to have this case tried with dignity and with respect to the rights of your clients which you are so thoroughly disregarding. And I'm saying this in the absence of every member of the jury; there's no one can hear it. You ought to begin to realize—

Mr. O'Donnell: I object to that.

The Court: Why don't you follow the custom of your fine assistant here that shows respect?

Now let's get back to this. I understand,—do I understand, Mr. Yates,—will you state again how you

feel about what you said with reference to this statement, that you made to the FBI agent. Was it read back to you?

The Witness: No, it is my best recollection I had agreed to a substantial writing that that is what happened that day.

The Court: Wouldn't that indicate to you it was read back to you if that is so?

The Witness: No, I'm sorry. What I have said here isn't right; that to the best of my recollection I was asked if this represented what happened that day.

The Court: Well, if you were asked if that is what happened, how could you say that unless it was read back to you?

The Witness: Only by my observing his writing as he wrote.

The Court: How could you observe his writing if you didn't know what he was writing?

The Witness: Well, I mean he was sitting next to me.

The Court: Well, are you satisfied to get, Mr. O'Donnell, the statement, this statement that was made by him as it is transcribed? Mr. Koen says they have no original notes. You have a chance to bring in Agent Frisoli first. I'll rule on it now, I'm going to rule on it now.

Mr. O'Donnell: Okay, your Honor.

The Court: All right. Would you turn it over to them, Mr. Koen?

Mr. Koen: This is the result of a demand made by him?

Mr. O'Donnell: As the result of a request made under the new statute.

Mr. Koen: And I say the new statute doesn't apply, Judge.

Mr. O'Donnell: The Judge has just ruled for you to turn it over.

Mr. Koen: No, he hasn't.

Mr. O'Donnell: Yes.

The Court: My difficulty is, I don't know how I can. If you let him read that over, then he can say whether he adopts it or approves it.

Mr. Koen: May I point out just one thing?

The Court: Or "otherwise adopted and approved by him"—that means, if it isn't written by him, if he reads it over and he approves it—he can't approve it until he reads it over. I don't know. This is a new procedure.

Mr. Koen: It's not a written statement for his adoption or approval. May I point out this to you?

The Court: No, "a written statement made by said witness and signed or otherwise adopted or approved by him".

Mr. Koen: Well, this is not a written statement; this is simply a mimeographed report which is in the—

The Court: I tell you very frankly, this is very, very important. This statute was set up to test any memorandum which would serve as a basis for testing the credibility of a witness; and I think I'll permit the witness to read it over and see if it does, and if it does, I'll order it turned over.

Now, if there is anything in there that counsel shouldn't see under the statute, then I'll read it myself; if you feel there is anything there that counsel should not see, I'll comply with the mandate of the statute and, as they say, examine it in camera. All that means is, I should examine it myself and

make such order as is necessary; and if there is anything there that they shouldn't see, I would order it impounded and have it available for the—

Mr. Louison: You spoke about the legislative background of those things the other day, your Honor, and it would seem that one of the principal things to be protected would be matters of internal security—

The Court: Oh, no.

Mr. Louison: —which obviously—

The Court: Oh, no, no, they're not at all.

Mr. Koen: There are other matters.

The Court: No, there are other matters.

Mr. Louison: Mr. Frisoli is not an informer.

The Court: What's intended to be protected is any situation which involves any person who has rendered quietly assistance to the Government in any collateral detail. That's exactly what I'm going to protect.

Mr. Koen: It also protects, if I may say,—

The Court: That doesn't cover the situation —on the Supreme Court's say-so.

Mr. Koen: It also protects any people whose names might be involved.

The Court: That's right. I'm thoroughly mindful of that, Mr. Koen.

Mr. Koen: It also protects any reference to any unsolved matters.

The Court: That's right. I'm heartily in accord with that, and I'm ready to examine it in camera, and I'm ready to have deleted from that statement such as is there without counsel knowing it, I'll sample it myself, then I'll order it impounded so as to be available for the higher court.

Mr. Hubley: Your Honor, this (e) (1) provides the only thing which a witness can adopt or provide is a written statement signed by him.

The Court: If it is a written statement. I don't know what it is.

Mr. Hubley: It has got to be a statement made by the witness.

The Court: No, adopted or approved by him. I don't know what it means. Let me take a look at it, if counsel doesn't object, or let counsel look at it. I think it ought to be shown to the witness.

[A pause.]

The Court: Now, will counsel come up. Why don't you let him look it over?

Mr. Koen: No, sir. I think the requirements of the statute have not been met, your Honor.

The Court: Oh, I think they have.

Mr. Koen: Well, now, you haven't—

The Court: Now, I have read it carefully, Mr. Koen. I'm going to permit counsel to see it.

Mr. Koen: Well, wait a minute. May I be heard?

The Court: Yes; but I have got to make a ruling on it.

Mr. Koen: Of course you've got to make a ruling.

The Court: I don't know if I'm ruling on something I haven't read.

Mr. Koen: You are ruling on something, may it please the Court, the witness has never seen.

The Court: The witness said yesterday in his testimony, in answer to one of the questions, that it was read back to him and it was substantially accurate as to what he said.

Mr. Koen: No, Judge, may I correct you on that, with all due respect?

The Court: Then he changed it.

Mr. Koen: No, he doesn't change.

The Court: That is all I meant.

Mr. Koen: The question yesterday was directed

to the notes that were made by Agent Frisoli by handwriting.

Mr. O'Donnell: And at the time.

Mr. Koen: No, at the time he was interviewed in the bank.

The Court: These questions have been asked before this jury, and I'm going to tell you now it does a great disservice to a jury not to let them know from the evidential point of view what the situation is. I have enough confidence in the Bureau to know if they put it there they put it there honestly; and I have enough confidence also to know that whatever it is—I have had some experience dealing with those reports that these bureaus make, I have never seen anything that contained any exaggeration—in all my lifetime I never have, and I have examined a thousand of them.

Mr. Koen: May I say, your Honor, that my objection to this request is not predicated on fear on my part, but I do know that in my interpretation of the statute, this is not a written document that has to be produced or is covered by the statute.

The Court: I don't know what it means, Mr. Koen. It says, "a written statement made by said witness and signed or otherwise adopted or approved by him".

Mr. Koen: That's right.

The Court: I don't know what "or otherwise adopted or approved" means.

Mr. Koen: May I analyze that for you?

The Court: Yes.

Mr. Koen: All right. First of all, this is not a written statement made by this witness.

The Court: No, that's right.

Mr. Koen: It's not signed by him.

The Court: That's right.

Mr. Koen: This document that I have in my possession was never seen by this witness, nor was it ever read back to him in any way; so I say, with all due respect, how can it be said he ever adopted or approved it?

The Court: I don't know whether it can or not. He is asked if he made this statement, and he has said he made a statement to a Government agent.

Mr. Koen: Not this statement.

The Court: Wait a minute now. He was asked, and he said yes, he did, on the afternoon of the 18th of July. He was asked if the statement made, as he talked to the agent, if he made some notations, written notations, and he said yes, he did. Isn't that right, Mr. Yates?

Mr. Koen: Yes.

The Witness: Yes.

The Court: He said he made them, he said he made notations until he finished answering questions. Isn't that right, Mr. Yates?

The Witness: Yes.

The Court: And then finally, last night, he said he would like to have an opportunity to determine whether or not, or what was read back.

Now will you go back, Mr. Martin, and read the early questions I asked this morning so I will not be misquoting?

[A pause.]

The Court: I haven't gone to the second one at all. The second one is one which would be compelling to influence my judgment in favor of these defendants on the first one, because it says "a mechanical, electrical, or other recording, or a transcription thereof". It could be read, even.

Mr. Koen: No, that is a narrow, narrow interpretation.

The Court: I don't think so. These penal statutes are intended to be construed strictly and in favor of the defendants. Don't forget that.

Mr. Koen: It would have to be a reproduction of what was transcribed.

The Court: What difference would it make, how can you repeat what a man is saying orally unless you write it down or transcribe it?

Mr. Koen: That's the recording, your Honor, which was made contemporaneously.

The Court: I know; but I don't—read the questions that I asked him. Will counsel please come up here and show some deference to the Court.

[Discussion off the record, following which the jury enters the courtroom.]]

Statement by the Court to the jury

The Court: [to the jury]. We have been discussing, what we have been engaged in is an examination of the facts and circumstances in connection with the demand—request, rather—made under Public Law 85269 by Mr. O'Donnell, to have presented to him the statement that was given to Mr. Frisoli, as I remember it, Federal Agent Frisoli, on the afternoon of the 18th of July. You will remember the evidence shows, that is, if you accept it and find, that there was a robbery, and obviously you have to find it . . . was committed on the 18th. On the afternoon of the 18th, Mr. Yates was interviewed by Mr. Frisoli.

This is a new Act, and I am desirous of having placed before you any circumstance or statement which might in any way be of assistance to you in determining the accuracy and the truth of the statement, particularly where it revolves around the charges here, where we have three defendants.

Now, the weight and value, of course, is for you. I

have given this some thoughtful consideration, I gave it thoughtful consideration last night; and Mr. O'Donnell has a statement which Mr. Yates has not seen as far as I know, and it is supposed to be—he didn't see it at the time of the bank holdup,—I mean, on the afternoon of the so-called bank holdup, but which I feel, under the interpretation I am obliged to give this Act, give counsel the right to have access to it. When counsel has done this, I intend to have this marked for identification purposes, and then I am going to have it impounded, and I do that only for this reason. That is, it will be available to nobody. I mean particularly, the newspapers or anybody else. It will be available to the United States Attorney and available to counsel for these defendants, and in this courtroom alone.

This is a Government record. I suggested to counsel for defendants that they could bring Mr. Frisoli, and they decided they wanted it this way, and I am going to comply with their request. Mr. O'Donnell has it, and the witness may now come to the witness stand, if you want him, or you may use it, Mr. O'Donnell, and when it is used, turned over to you, it may now be marked for identification purposes only and turned back to you. I hope counsel heard what I have said. It is to be turned over to the Clerk to be marked for identification purposes and then returned to you.

Mr. O'Donnell: Now?

The Court: That's right. It is part of the Government record.

[Document handed to Clerk.] It is always considered confidential until there has been a decision by the Supreme Court of the United States.

The Clerk: Government's Exhibit 20-A through D for Identification.

[Said document marked Government's Exhibit 20-A through D for Identification.]

The Court: I don't disagree with this procedure. It doesn't make any difference whether I do or not. It's the law of the land. I cannot see anything apart from that.

I want to say to you, ladies and gentlemen of the jury, the Court hasn't seen it. I haven't the slightest idea what it is.

[The document is returned to Mr. O'Donnell.]

[157]

FRANCES L. YATES, Resumed

Cross Examination by Mr. O'Donnell, Continued

XQ. Now, Mr. Yates,—

The Court: I am going to direct you, Mr. O'Donnell, to let Mr. Yates look at that as you go along. I think that is the fair way to do. Get it established here. He says he has never read it. Isn't that right, Mr. Yates?

The Witness: I didn't read this statement.

The Court: That's right. It was made by somebody else, and I think he is entitled to know what somebody else says there.

Mr. O'Donnell: Now may the record show that counsel for defense is handing to Mr. Yates that report given to me by Mr. Koen, concerning the interview with FBI agent Leonard Frisoli.

Mr. Koen: Government's Exhibit 24-A-D for Identification.

Mr. O'Donnell: Mark it for identification.

The Court: If it becomes necessary to mark this as an exhibit—

Mr. O'Donnell: 20-A-D.

The Court: —I will settle that later on.

[948] [Witness peruses exhibit.]

The Court: I meant to have you go along and interrogate him.

Mr. O'Donnell: Oh.

The Court: I didn't mean to have him read it. I meant to have you interrogate him. I don't want to interrupt your cross-examination. But I think it should appear Mr. O'Donnell is cross-examining on something that he didn't write, it was written by somebody else and prepared. It really isn't a report, it isn't signed by anybody, but it is a report of the FBI, purporting to presumably represent, from your point of view, what this gentleman told a representative of the FBI.

I think you may go ahead now, if you will.

XQ. Now, Mr. Yates, in the course of your interview with Mr. Frisoli, you had occasion at that time to discuss the photograph or photographs? A. At the time of the interview?

XQ. Yes. A. With Mr. Frisoli?

XQ. Yes, sir. A. No.

XQ. Now, whether or not when that interview was going on at the bank on July 18th, Mr. Leonard was in the bank? A. We all were in the bank.

XQ. Is it fair to say you were all being interviewed by the FBI agents that were on the premises at the time? A. Individually, yes.

XQ. Yes. How long after the incident you described here yesterday did you first see a picture? A. Within a few days, to the best of my recollection.

XQ. And of course to your knowledge you knew that on that day Mr. Leonard was shown photographs?

The Court: No, I—

Mr. Koen: I'm going to object.

The Court: I exclude it. I'm going to exclude that. How would he know what Mr. Leonard was shown?

XQ. Now, Mr. Yates, I show you Government's Exhibit No. 9-A and ask you to look at it. First of all, in reference to the photographs being displayed by Federal agents

on that day in the bank, have you exhausted your memory in that regard? A. About these photographs?

XQ. Yes. A. Well, as I said yesterday, I believe, I have seen them on several occasions.

XQ. But your memory in reference to July 18, 1957?

Mr. Koen: About what? Wait a minute.

XQ. In reference to photographs. A. I don't recall seeing photographs on that date.

XQ. Have you exhausted your memory in that regard now? A. Yes.

XQ. I show you Government's Exhibit No. 9-A and ask you to read it to yourself. [Witness peruses.] Have you read it, Mr. Yates?

Mr. Koen: Note my objection to any question. May I be heard at the bench?

The Court: Oh, certainly. Come up.

[Conference at the bench, during which the following is recorded:]

Mr. Koen: May we have 9-A? May I have that document, Mr. Clerk? [Handed.]

The Court: [to jury]. You know why I do this. I do it so there will be no suggestion I am keeping from the jury anything which might be helpful to the Government or helpful to the defense.

Mr. Koen: I don't know how this document got into his possession, but it is not a document which I submitted under the Court's order. The Court's order was directed only to the document prepared by Agent Frisoli.

The Court: That's right.

The Clerk: It was marked as an exhibit.

The Court: Oh, I'm sorry.

Mr. Koen: I have another objection.

The Court: Let me read it. [Peruses.]

Mr. Koen: My objection is this. The impression

or the question that was asked relates to a conversation with Agent Frisoli.

The Court: This is a matter—this pertains to Mr. Leonard.

Mr. O'Donnell: That's right.

The Court: It doesn't pertain to him.

Mr. O'Donnell: That's right.

Mr. Koen: I have a third objection.

Mr. O'Donnell: I press it.

The Court: No, I tell you what I'm going to do. I don't need any more objections. I'm excluding it.

Mr. Koen: May I be heard on the matter?

The Court: No, I've already ruled.

Mr. O'Donnell: May I ask him if it refreshes his recollection?

The Court: Yes, you may ask him if that refreshes his recollection, and if he still says that was a statement that was made by Mr. Leonard, you had Mr. Leonard on the witness stand.

Mr. O'Donnell: This is a Government exhibit.

The Court: I know it, it was marked at the time when you had Mr. Leonard on the witness stand, and you had a full opportunity to examine it. I'm not saying—

Mr. Koen: I have another objection.

The Court: What is it?

Mr. Koen: If your Honor is ruling that the Federal Rules of Criminal Procedure apply, then this is something that was not brought out on direct examination by me.

The Court: Well, the difficulty is, you see,—wait a minute. If there is any memoranda at all, written or otherwise, apart from this,—any memorandum, no matter by whom it was written,—if it refreshes his

recollection so he can say if it is shown him it does, then you would have no objection to that?

Mr. Koen: No.

The Court: He hasn't said it does.

Mr. O'Donnell: He has.

The Court: I'm not going to let it go in, so don't worry, but I'll let you ask the question.]

The Court: [to witness]. I'm going to let you read that. Would you show it to him, Mr. O'Donnell, please?

Mr. O'Donnell: Yes.

The Court: I am going to exclude it. Did you read it?

Mr. O'Donnell: He read it to himself.

The Witness: I did.

The Court: Now you may ask him—after having read it, you may ask him the question whether or not he now says he didn't see the pictures that afternoon.

XQ. Would you tell us, sir, whether or not, as a result of reading the document that has been marked as Government's Exhibit 9-A, your memory has been refreshed in reference to photographs being shown you on that day?

The Court: I am going to exclude that question because I am not going to let that question go in that way and that's not the way it's going in. He didn't write that memorandum. It was written by somebody else. It concerned Mr. Leonard. And you may ask him if in the light of that he still says he wasn't shown any photographs, that's all. That's the only question I am going to allow.

Mr. O'Donnell: Objection.

XQ. Now, Mr. Witness, as a result of reading—

The Court: Based on that document there which is part of the evidence and which has been marked as an exhibit,—it was marked in connection with the presence of Mr. Leonard, which you have never seen before, have you, Mr. Yates?

The Witness: No, I haven't.

The Court: All right. Now, you may ask him the question whether or not—I think you ought to put the question to him, Mr. O'Donnell. I don't like to. I give you the right to put that question to him.

XQ. Whether or not, Mr. Witness, you now, as a result of reading this document, have any memory? A. No, I have not.

The Court: That answer may be stricken, the question may be stricken, and the question will be framed, Mr. O'Donnell, the way I suggested, or it won't be framed at all.

Mr. O'Donnell: All right.

The Court: If you don't ask it, I'm going to ask it.

Mr. O'Donnell: All right.

The Court: But I'll give you the chance to ask it. [To witness] Does the reading of that memorandum, Mr. Witness, in any way change your testimony that you didn't see photographs on Saturday afternoon?

The Witness: No way at all.

The Court: Your memory is that you didn't?

The Witness: My memory is I did not see photographs that day.

Mr. O'Donnell: May the record be corrected as to the day of July 18?

The Court: I don't know what difference it makes.

Mr. O'Donnell: What was the date? ~~July 18th?~~

Mr. Koen: July 18th.

XQ. It wasn't a Saturday, was it? A. Thursday, in my recollection.

The Court: I didn't mean Saturday. I beg your pardon. The alleged occurrence took place on July 18th, which was a Thursday. Isn't that right, Mr. O'Donnell?

Mr. O'Donnell: I think so.

The Court: It was that afternoon. I said Saturday.

It was that afternoon, the afternoon of the day on which you talked to Agent Frisoli; isn't that right?

The Witness: It was that day, yes.

The Court: And your testimony is, there has nothing been shown you which would change your testimony, namely, that they showed you no photographs, nobody showed you a photograph of anybody on the afternoon of the day of the alleged robbery?

The Witness: Not to my recollection.

XQ. Now, Mr. Yates, whether or not you had an interview with FBI Agent Guy R. Bailey? A. I don't recall that name, or talking to him.

XQ. Whether or not, sir, you had an interview with FBI Agent John P. Larkin? A. I don't recall an interview with that name.

XQ. Whether or not, sir, you had an interview with FBI Agent Russell J. Harvey? A. The name is familiar. I cannot say yes.

XQ. What is your best memory, Mr. Yates?

The Court: Didn't you give your best memory when you said you cannot say yes?

The Witness: Yes.

XQ. Whether or not, Mr. Yates, you had an interview with FBI Agent John McGillicuddy? A. I have spoken to him several times.

Mr. Koen: The question, may it please the Court, was whether or not he had an interview. Could I have an answer to that question?

The Court: I think that is right. You know, what he means by an interview, whether or not you talked with McGillicuddy.

The Witness: I talked to McGillicuddy, yes.

XQ. Whether or not, sir, you had an interview with FBI Agent Shannahan? A. I'm afraid that name doesn't mean anything to me.

XQ. Now, sir, can you identify—thinking of the names I just mentioned in the series of questions—with whom you were when you were shown photographs? A. Well, I was shown photographs by—I beg your pardon. You mean those that took them or those that showed me photographs? Is that what you mean?

XQ. Yes. A. There were two men that came out—I cannot mention their names, I do not recall them—that showed me photographs on several occasions. They came to the bank. I would know them by sight, I think, but not by name.

XQ. And would you know what their affiliation was at the time they were showing you these photographs—what their occupation happened to be? A. I believe they were FBI agents.

XQ. So, the way you leave your testimony is, you have had photographs shown to you by FBI agents as a result of the occurrence on July 18, 1957? A. That's right.

The Court: Do you maintain, Mr. O'Donnell, there is anything wrong about Agents showing photographs of a situation?

Mr. O'Donnell: I not only maintain there is nothing wrong with it, but I say that is the fundamental police procedure.

The Court: Of course that's the fact. That's what a good investigator or a good peace officer would do.

Mr. O'Donnell: That's right.

XQ. Now, Mr. Yates, following that July 18, 1957, and prior to coming into this court, whether or not, sir, you ever viewed any of the defendants?

Mr. Koen: I object.

The Court: Did what?

Mr. O'Donnell: Viewed any of the defendants.

Mr. Koen: My objection. It is not matter covered on direct examination, sir.

The Court: I exclude it.

Mr. O'Donnell: It is on the question of identification.

The Court: I said today I intended to limit cross-examination to what was brought out in direct.

Let me ask you this, Mr. O'Donnell. Do you mean—what you mean by this, Mr. O'Donnell, if I can construe what you mean correctly,—do you mean, if he was shown photographs?

Mr. O'Donnell: No; no. I covered the photographs.

The Court: What is it, then?

Mr. O'Donnell: Whether he viewed the person of any of the defendants in court.

The Court: I'll permit that question. Go ahead. I think that was brought out in direct in that form.

A. Viewed them in person; is that what you mean?

Mr. Koen: In court.

The Witness: In court?

XQ. No, prior to coming to court, sir, and subsequent to July 18th, 1957?

Mr. Koen: Well, to that I object.

The Court: Well, I'll allow it. You mean, prior to coming to court, where? I'll let it be answered. Go ahead. All right, Mr. Yates.

A. Yes, I have.

XQ. And—

The Court: [to the jury]. You see, one of the difficulties, the inescapable fact this jury will have to pass upon, Mr. Prosecutor, is this: that Mr. Yates positively picked out one of these defendants, the man on this side, the defendant on this side—Alvin Campbell's brother, I guess it is,—is he? He picked him out.

Mr. O'Donnell: [to defendant]. Do you want to stand up? [Defendant rises.] Arnold Campbell.

The Court: Arnold Campbell. I am permitting you to ask any question which would tend to affect in any way the identification by this witness. You have a perfect right to do that; and that's why I am permitting the question, Mr. Prosecutor.

XQ. Now, Mr. Yates, where did you make this view?

A. Of which person? Mr. Arnold Campbell?

XQ. Yes. A. The first time I saw him, to my recollection, was, I believe it is the East Cambridge Court. I believe that's what you term it.

XQ. All right. And can you approximate the date?

A. No, I can't.

The Court: [to the jury]. Now I'd like to say, Mr. Foreman and ladies and gentlemen of the jury, at the expense of being repetitious—I think it is necessary for me to repeat it frequently—that any statement that I make, the Court makes, apart from the law, when I rule out a question I know you will accept my ruling, and when I admit a question you'll accept my ruling. I have ruled for the Government and I have ruled against the Government. But if I make any statement in connection with any factual circumstance, I want you to know I do it in only an advisory way, because the weight of testimony is for you. I have a right, within the bounds of reason, to make a statement in an advisory way. State courts do not have that right. It's a right that I exercise with a great deal of care, and that's why I repeat.

I didn't want to interfere with your train of thought, Mr. O'Donnell. I noticed you talking to your associate there, and I thought it was a good chance to say that.

All right, Mr. O'Donnell.

XQ. Now, Mr. Yates, my question is whether or not you viewed any of the other defendants—

Mr. Koen: My objection.

XQ. —prior to coming into this court house and subsequent to July 18, 1957.

Mr. Koen: My objection to that.

The Court: He hasn't identified the others, has he? I don't know. My memory is not set. Are you asking this question upon the assumption that this witness has identified another one of these defendants? If you are—or said something from which the jury could find that that together with other circumstances might affect your clients' rights, I am going to permit you to ask the question.

Mr. O'Donnell: That's the reason, your Honor.

The Court: All right, go ahead.

XQ. Mr. Yates, could you answer that question? A. May I have the question again, please?

XQ. Whether or not you viewed any of the other defendants subsequent to July 18, 1957, and prior to coming into this courtroom? A. Yes, I have.

XQ. And would you now say that, is it fair to say that you viewed the other two defendants—by that I mean Alvin Campbell and Donald Lester—prior to coming into this courtroom? A. I viewed—yes, I did.

XQ. All right. And where was that view, Mr. Yates? A. That was at the lineup at Boston Police Headquarters, I believe.

The Court: Was that the only time?

The Witness: Beg pardon?

The Court: That was the only time?

The Witness: Yes.

The Court: And that was at a time when they were all brought to police headquarters and you entered one at a time, did you?

The Witness: Yes. And the lights and everything.

XQ. Now, Mr. Yates, at the Boston Police lineup, whether or not Arnold Campbell, the man you pointed out yesterday,

was in that lineup? A. Not to my knowledge; not to my recollection.

XQ. And whether or not, sir, at that lineup you pointed out one of the other two defendants? A. At first I did, yes.

XQ. And it's fair to say that at the lineup you did not point out Alvin Campbell, his brother; that's so, isn't it? [962] A. Not at first.

XQ. So that in regard to the man you identified, pointed out here yesterday, at the lineup the fact is that this is the man that you pointed out at first [pointing]? A. At first.

Mr. O'Donnell: May the record show that is Donald Lester.

XQ. And then you, sir, withdrew your pointing out of that person on that occasion; that's so, isn't it? A. That's so.

[A pause.]

Mr. O'Donnell: May we approach the bench, your Honor?

The Court: Yes.

[Conference at the bench, during which the following is recorded:

Mr. O'Donnell: Your Honor,—

The Court: I haven't seen this statement.

Mr. O'Donnell: Oh, yes [handing].

The Court: As a matter of fact, I suppose what I have got to do, as I read it—I had Walter go out and get the case decision, and apparently from that decision there is nothing there that says—well, it would seem to indicate that I should read it. [Handed statement.]

I tell you what I will do about this situation, gentlemen. What was on your mind first, Mr. O'Donnell?

Mr. O'Donnell: We would now request under the statute as we examine what Mr. Koen turned over to us as Exhibit No. 9, it doesn't include a report showing to the witness photographs, it's not a part of that, and that is—

Mr. Koen: You asked for a specific document and I gave it to you.

The Court: That I ruled on that afternoon.

Mr. O'Donnell: So now my request is for the report concerning this witness being shown photographs.

The Court: He says he wasn't shown photographs at the police station.

Mr. Koen: At a later date.

The Court: At the lineup at a later date.

Mr. Louison: No, he said several occasions.

Mr. O'Donnell: Several occasions.

The Court: Well, you haven't shown who it was that—I'm not going to order that now. But what I am going to do now is this.

Mr. Koen: Wait a minute.

The Court: I am thinking very seriously of admitting this statement.

Mr. Koen: On the basis of going to the jury, perhaps, what are you asking for, sir?

[1964] Mr. O'Donnell: I'm asking for the United States to produce any reports that it has concerning this witness at the time he was shown photographs by FBI agents following July 18, 1957.

Mr. Koen: I submit the request does not come within the provisions of Title 18-35.

The Court: I am going to rule that it doesn't at the present time.

Mr. O'Donnell: Objection.

The Court: I am not interfering with your right

now to pursue an inquiry to make it admissible at the proper time, Mr. O'Donnell.

Mr. Koen: May I interject this? It has not been shown, and it cannot be shown, I believe, that whatever report he is talking about or indicated in any think that this man has said—

The Court: That's right.

Mr. Koen: —was adopted or approved by him, or a contemporaneous instrument.

The Court: But he said he was shown photographs. He was shown photographs at the lineup in police headquarters, wasn't it?

Mr. Koen: That has nothing to do with this, Judge.

The Court: He was shown pictures at different [1965] times.

Mr. O'Donnell: Yes.

The Court: What's wrong about it?

Mr. O'Donnell: Nothing, not a thing.

[A pause.]

The Court: Now, I tell you, Mr. Koen, I would like to have you come up here.

Mr. Koen: Yes, sir.

The Court: In the light of this statement and in the light of the Jenckes case, I had these marked for identification. I am saying this so you will be mindful of it, Mr. O'Donnell. I am not going to rule on it now, but I am disposed to admit these as evidence because—let me finish now—because the statute says nothing about admissibility. As a matter of fact, I sent Mr. Hubley for this case and it confirms my judgment. [Reading]:

“Only after inspection of the reports of the accused must the Trial Judge determine the admissibility. That's an evidential question of consistency, materiality, and relevancy of the con-

tents in the effort to be employed for the elimination of the part in question."

Now, it is my obligation to see to it that this jury gets no idea of what is here beyond what he has already said on the witness stand, if there is anything in this report that is inconsistent with what he said on the witness stand. Now, if there is, that settles it.

(Further discussion off the record.)

The Court: These are what you are going to offer?

Mr. Koen: That's right. That [pointing] doesn't belong. There are four pages, and this is the first one, sir, the second one, and that is the third one, and that is the last one.

The Court: Now, Mr. Koen, are you going to offer these in evidence?

Mr. Koen: I haven't decided yet, sir, whether I shall or not.

Mr. O'Donnell: At the present time, your Honor, I am making an unconditional demand for everything regarding this witness' testimony in the possession of the United States.

Mr. Koen: I want to get the import of the phrase "regarding this witness' testimony".

Mr. O'Donnell: This witness' testimony here in this court.

The Court: You mean, the statements he has made at any time?

Mr. O'Donnell: Yes.

Mr. Koen: Do I understand now these be made available—

Mr. O'Donnell: That they—

Mr. Koen: Let me finish, please.

Mr. O'Donnell: I mean, file No. 91-95(2).

Mr. Koen: Of course that's a fishing expedition, and it's contrary to the spirit of the rules.

The Court: I have had no foundation stone, there is no evidence to show that he ever made any statement outside, so I can't act under this rule. If you have any evidence—I've got to get along with this trial, Mr. O'Donnell. The only time he ever made a statement was to this man and nobody else

Mr. O'Donnell: No.

The Court: Now he may have seen photographs; but, if he has seen photographs, what is wrong about these photographs?

Mr. O'Donnell: Well, what I am asking on the record—

The Court: How are you going to detect arrest, trial, punishment of anybody, unless you [968] first have an investigation? You wouldn't be protected.

Mr. O'Donnell: I know that, your Honor.

The Court: You wouldn't be protected.

Mr. O'Donnell: I'm all in favor of it.

The Court: Certainly.

Mr. O'Donnell: The thing is, there's evidence as a result of direct and cross-examination that this man has talked to FBI agents in addition to others.

Mr. Koen: No, there is no such evidence in the case on direct examination.

Mr. O'Donnell: On cross-examination. And I therefore make an unconditional demand for all reports of this witness' testimony, including police line-ups.

The Court: You mean you want Grand Jury testimony, too?

Mr. O'Donnell: I haven't asked for that, your Honor.

The Court: I certainly wouldn't give it to you—

don't worry. Do you mean you are making it as a common law demand apart from the statute and apart from the Jenckes case?

Mr. O'Donnell: Yes, your Honor.

The Court: All right.

Mr. Koen: I will give to Mr. O'Donnell every document that I have in my possession relating to this defendant, but I do not think that any reports from the Boston Police Department to the FBI are admissible against this defendant.

Mr. O'Donnell: We will never get anywhere in this case.

Mr. Koen: You can put it in.

The Court: You have a right to put it in. There's no record we have of the Boston Police Department, except in so far as a record might be used by someone who may or may not be called as a witness by the Government. I don't know. This was distinctly and absolutely a Federal investigation, aided and assisted by the cooperation of the Boston Police.

Mr. Koen: No, in no way, your Honor. There was no such request.

Mr. Louison: The request from the FBI.

Mr. Koen: It was not.

Now, on that condition, the offer is accepted and I will give the other two documents to Mr. O'Donnell.

(A pause.)

The Court: We will let the jury have a respite a little bit earlier. I would like to finish with this witness if I could, that's all.

[The jury retires from the courtroom at 11:25 a.m.]

Mr. Koen: In accordance, may it please the Court, with the demand made by Mr. O'Donnell, I am now tendering to him, first, a report of an interview with Frank Yates on July 19, 1957, at Canton, Mass., by

Special Agent Russell J. Pardee of the FBI; and I am also giving to him, in response to his common law demand, a report of an interview with Francis L. Yates on July 19, 1957, by Special Agent George R. Mowbray. These two, as the other one which I have given to him in accordance with his demand, are mimeographed copies of reports of interviews. They are not anything else.

The Court: That is what they are. You mean by that, Mr. Koen, if they are mimeographed, obviously they are duplicate originals?

Mr. Koen: They are duplicates of original documents.

The Court: That's right, they are duplicates of the originals.

Now, I am going to have put on the record, that there has been turned over by Mr. Koen to Mr. O'Donnell, who is examining them, these documents, and now they may be marked for identification. Where is Mr. Murray? Let's have them marked.

Don't misunderstand me, Mr. O'Donnell. My only purpose in doing this is to make certain that they are made available.

[Two documents marked Government's Exhibit 21-A and B for Identification, respectively.]

Mr. Koen: Mr. O'Donnell, don't destroy the fabric, please. They are in practically the same condition we got them.

The Court: I will take the recess.

[Short recess. Jury returned to courtroom at 11:58 a.m.]

The Court: Mr. Yates, would you be good enough to come back.

[Witness resumes the stand.]

Mr. O'Donnell: May it please the Court, I now offer Government's Exhibit 21-B for Identification as a defense exhibit.

[Said exhibit marked Defendants' Exhibit A.]

The Court: What about the other one?

Mr. O'Donnell: I will offer this one, too.

The Court: I don't want you to do it unless you want it. It's up to you entirely.

Mr. O'Donnell: I will offer it as a defense exhibit.

The Court: In the interest of time-saving, it may be done now.

[Two documents formerly marked Government's Exhibit 21-A and B for Identification now marked Defense Exhibits A-1 and A-2, respectively.]

Mr. O'Donnell: Mr. Foreman, and ladies and gentlemen of the jury, Defense Exhibit A-1, entitled "Federal Bureau of Investigation Interview Form," reads as follows:

"FRANCIS L. YATES, note teller, victim bank, was interviewed by SA(A) George A. Mowbray on July 19, 1957, on premises of victim bank. YATES was exhibited photographs of suspects in instant case and picked suspect ALVIN A. CAMPBELL as having facial characteristics similar to one of the robbers. He stated that the profile of suspect CAMPBELL was similar to one of the robbers because of the protruding lips and receding hair line. It should be noted that as YATES was viewing the pictures of the various suspects, he hesitated when looking at the picture of ARNOLD S. CAMPBELL, brother of ALVIN R. CAMPBELL, and stated that he thought that suspect ARNOLD S. CAMPBELL also resembled one of the robbers. YATES stated he could not positively identify either Arnold or Alvin Campbell as being a participant in instant robbery.

Interview with FRANCIS L. YATES File #91-952
on July 19, 1957, at Norfolk County Trust Company,
Canton, Massachusetts, by Special Agent (A) GEORGE
R. MOWBRAY/bab

Property of FBI—This report is loaned to you by the FBI, and neither it nor its contents are to be distributed outside the agency to which loaned."

Now this is Defense Exhibit A-1.

Defense Exhibit A-2, entitled "Federal Bureau of Investigation Interview Report", reads as follows:

"MR. FRANK YATES, Assistant Manager, Canton Branch of Norfolk County Trust Company, was interviewed at the bank on July 19, 1957.

Mr. Yates was shown a list of serial numbers marked 'Teller #3 Canton', dated 6/26/57, and he stated that he, while assigned as Teller #3, had recorded these serial numbers when he prepared a decoy currency package. He said that the decoy currency package contained \$5 and \$10 bills and totalled \$200. He stated that he had turned over his cash in teller's position #3 to ETHEL MILLIGAN about July 1, 1957, and that this decoy package was contained in the cash at that time.

YATES also stated that he had turned the list of recorded serial numbers of bills in the decoy package over to MR. LEONARD, the Branch Manager, shortly after he prepared it.

Interview with FRANK YATES File #91-952
on July 19, 1957, at Canton, Massachusetts, by Special Agent RUSSELL J. PARDEE (A)

Property of FBI—This report is loaned to you by the FBI, and neither it nor its contents are to be distributed outside the agency to which loaned."

The Court: Do you maintain, Mr. O'Donnell, this witness was interrogated by Mr. Koen or by yourself on cross-examination in connection with the details of the last memorandum?

Mr. O'Donnell: No, I don't recall it.

The Court: That's right.

Mr. O'Donnell: I don't make that contention.

The Court: That's right. I will permit the Government to go into that in redirect as long as it has been opened up. I don't know what it is, but the jury is entitled to know what it is. I don't know.

Any further questions?

Mr. O'Donnell: No further questions from the defense, your Honor.

The Court: All right.

Mr. Koen: May I have, Mr. Clerk, Government's Exhibits numbered 20-A-D for Identification? [Handed.]

Could I have, Mr. Counsel, all of the Government's exhibits in this case which are now in your possession? [Handed documents.]

The Government now offers formally for all purposes the former Government Exhibit 10 for Identification.

[Documents formerly marked Government's Exhibit 10 for Identification admitted as Government's Exhibit 10.]

Mr. O'Donnell: May I have it? [Handed.]

Mr. Koen: The Government now offers for all purposes the document—

Mr. O'Donnell: This was Government's Exhibit 9.

Mr. Koen: No, this is Government's Exhibit 10 for Identification.

Mr. O'Donnell: The others have been admitted.

The Court: Are these the documents that were turned over to counsel for these defendants as a result of an order of court in connection with my ruling on Public Statute, so-called?

Mr. Koen: These are the documents which I furnished to Mr. O'Donnell in response to his common law demand for the production of these documents, sir.

Mr. Louison: The witness Leonard was on the stand, your Honor.

The Court: I will admit them in evidence and save your rights.

Mr. O'Donnell: May I have my exhibits?

Mr. Koen: Will you let me find out for the record, please, Mr. O'Donnell: Is that now formally Government's Exhibit 9-A?

The Clerk: Government's Exhibit 9-A for Identification is now admitted as Government's Exhibit 9-A.

[Document formerly marked Government's Exhibit 9-A for Identification now admitted as Government's Exhibit 9-A.]

Mr. Koen: Government's Exhibit 9-B for Identification I now formally offer for all purposes.

The Court: Which one is that, Mr. Koen, tell me?

Mr. Koen: It is another document the Government gave to Mr. O'Donnell on his demand.

The Court: All right. It may be marked.

[Document formerly marked Government's Exhibit 9-B for Identification now admitted as Government's Exhibit 9-B.]

Mr. Koen: I now offer Government's exhibits numbered 9-d, e, and c, which were marked for identification as formal exhibits.

The Court: What are those, may I ask?

Mr. Koen: May I see them, Mr. Murray? They are three reports, sir, 1, 2, 3; documents, sir, of Mr. Leonard.

The Court: Well, I thought they were marked as exhibits.

Mr. Louison: If your Honor please, I think they were. Mr. Leonard read from them.

The Court: If they were marked for identification, I don't think so. What does the record show? The record of the Clerk of this court shows they were only marked

for identification, so obviously, if they were marked for identification, and if they were read to the jury, they shouldn't have been read, and I am now allowing them to be marked as exhibits, and that means they can be read.

Mr. Koen: 9-A, B, and C, sir.

The Court: They are admissible.

[Nine lettered statements formerly marked as Government's Exhibits 9-A, B, and C for Identification, now admitted as Government's Exhibits 9-A, B, and C, respectively.]

Mr. Koen: I now offer as Government's formal exhibits the documents which were formerly identified as Government's Exhibits 20-A, B, C, and D.

The Court: Now, are those the papers that were turned over in conformity with the order of the Court in connection with the hearing and outside the jury yesterday and outside their hearing this morning?

Mr. Louison: Yes, your Honor.

The Court: Under the new Act?

Mr. Louison: Yes, sir.

The Court: I am going to admit them.

Mr. Louison: Save our rights.

The Court: Sure.

Mr. Koen: And may I say the record shows there was a demand covering those, too?

The Court: That's right. Well, Mr. O'Donnell made it perfectly clear, he was making demand under the so-called new Act which came down after the Jenckes decision, which we have referred to as Public Act. May I ask for the reference?

Mr. O'Donnell: Yes, your Honor. Public Law 85-269 85th Congress, September 2, 1957.

Mr. Koen: With all due respect, sir, I think it shows otherwise; but that is for another time.

The Court: With respect it shows otherwise—I don't know what you mean.

Mr. Koen: I think the record will show that a general demand was made under the common law, and I provided these documents under that demand.

The Court: I may say that I ordered these produced as the result of a hearing under the Act which has been specifically referred to as the Act that went into effect September 2d, and I have read this statement, and I am disposed to admit them, and they may be read to the jury.

[Documents formerly marked as Government Exhibits 20-A, B, C, D, now admitted as Government's Exhibits 20-A, B, C, and D, respectively.]

Mr. Koen: May it please the Court, Mr. Foreman and members of the jury, this is a 4-page document which on the first page bears the caption "Federal Bureau of Investigation Interview Report".

The Court: In fairness to the defendants I want to say this, and in fairness to the Government. These documents that you are reading are the ones that were introduced this morning, which were turned over, which were notes from Mr. Frisoli; is that right?

Mr. Koen: I was just about to describe them as such, sir.

The Court: It is true that demand was made by counsel for the defendants in general terms; but I ordered these particular records turned over in compliance with the mandate as I interpreted the mandate under the new statute. So that you were right when you said that; but I made the order under the new statute, and I am now allowing them and admitting them as evidence, and you may read them to the jury.

Mr. Koen: Thank you, sir.

The Court: I am admitting the writing as an exhibit. Read it to the jury.

Mr. Koen: This is a 4-page document entitled "Federal Bureau of Investigation Interview Report". At the bottom of the first page and on each of the other three appears this legend:

"Interview with FRANCIS LAMBERT YATES File #91-952 on July 18, 1957, at Norfolk County Trust Company, Canton Branch, 710 Washington Street, Canton, Massachusetts. By Special Agent LEONARD M. FRISOLI—cak. Property of FBI—This report is loaned to you by the FBI, and neither it nor its contents are to be distributed outside the agency to which loaned."

And the report is as follows:

"Mr. FRANCIS LAMBERT YATES advised SA LEONARD M. FRISOLI on July 18, 1957, that he presently is Acting Assistant Manager and his regular position is that of Note Teller of the Norfolk County Trust Company, Canton Branch, 710 Washington Street, Canton, Massachusetts. He presently resides at 155 Laureston Street, Brockton, Massachusetts, and he has been employed at this bank since June, 1953.

Concerning the robbery, he stated he was sitting at a desk just behind the manager's desk and at 10:05 a.m., he looked at his watch since he had contemplated going out for coffee. He said he did not leave the bank at this time since one of the three tellers, Mrs. ETHEL MILLIGAN, had not returned from having her coffee. Approximately five minutes later, the manager, F. RICHMOND LEONARD, told him he was stepping out for a few minutes and he had noted that shortly prior to this, Mrs. MILLIGAN had returned as he recalled her talking to Mr. LEONARD about a savings account. He believed the manager was out of the bank for approximately 3 to 4 minutes and he estimated the time as being approximately 10:15 a.m. when he heard the door leading to the manager's

office rattle, and he observed a negro man standing there.

He got up from his desk and went to this door, which was locked and can be opened by turning the latch located on the inside section of the door.

As he approached this individual, he inquired, 'Can I help you, sir?' He did not recall what this person said, since after making his inquiry, he observed this individual raise a pistol in his right hand, which he described as being an automatic. He recalled the robber saying either 'Let me in' or 'This is a holdup.' After receiving this command, he let this robber in and just before this individual entered into the manager's desk area, the robber reached down toward the floor and picked up a peaked-type, medium brown, zippered briefcase by its handle.

YATES stated he was then instructed to go back toward the rear of the bank and after he reached the area of his desk, he was commanded by this individual to turn around, face the rear of the bank and put his hands up. He recalled the other robbers were also shouting commands, none of which he could remember.

This individual, who is being referred to as the No. 2 man, got down on one knee and kept an eye on him, as well as the main entrance to the bank. YATES stated he recalled the No. 2 man saying, 'Someone is coming in.' YATES believed the No. 2 man knelt down on one leg so that he could not be observed by anyone who might enter the bank.

YATES next recalled being instructed by the No. 2 man to open the door which leads to the tellers' cages from the manager's office. YATES said he did not have the key or that it had to be opened from the inside. He then observed one of the bandits, who

is being referred to as the No. 3 man, jump over the glass top which leads from the manager's section into the tellers' cages. The No. 3 man landed on a desk used by the Note Teller. The No. 3 man had in his hand a cloth bag and a gun. He observed the No. 3 man entering the tellers' cages and start to take money from the tellers' cash drawers. He saw the No. 3 man at Mrs. MILLIGAN's cage, at which time he was using his right hand to put the money into the bag. He believed the No. 3 man opened the door which leads into the tellers' cages from the manager's section prior to starting to clean out the money from the cash drawers.

YATES recalled hearing some activity and conversation relating to having the tellers go into the vault for additional money. He then recalled the No. 2 man open the zippered briefcase and taking out a folded paper bag and throwing it along the floor towards Mrs. MILLIGAN, whom he believed picked it up. He did not recall seeing this paper bag again after Mrs. MILLIGAN picked it up.

The next thing he recalled was one of the police officers of the Canton Police Department entering the bank and heard him being commanded to raise his hands. Shortly thereafter, some other individual entered the bank, after which all the bank employees and customers were instructed, with the exception of the police officer, to put their hands down.

YATES stated the manager returned to the bank shortly after the police officer and was commanded by the bandit near him to go to the rear of the bank. He could not recall if this command was repeated to the manager by the No. 2 man after it had been given by one of the other bandits. He described the No. 2 man as being very nervous and based his opinion

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on the continuous and repeated commands being given by the No. 2 man.

YATES recalled the No. 2 man saying on two or three occasions, 'If the police come in and get us you will all get it.' The No. 2 man also said to the manager, 'You will be the first one.' He recalled the No. 2 man repeating, 'Let's get out of here. Let's get out of here.' He said he started making these statements shortly after the No. 3 man had cleaned out the tellers' cash drawers and prior to the tellers going into the vault to get additional money for the bandits. He stated he did not recall anything unusual in the No. 2 man's speech and described him as being quick in speech.

YATES stated shortly thereafter he recalled being instructed by one of the bandits to get into the vault and he was the last one to enter the vault. He believed he received this command to get into the vault from the No. 1 man. He believed the No. 2 man then raised the folding ramp which ran from the vault floor to the floor of the bank and placed it inside the vault and closed the vault door. Because of the ramp jamming the vault door, the bandits were unable to lock the vault door. He recalled the No. 1 man saying, 'Don't worry. We won't let you suffocate.'

YATES believed the robbery lasted for ten minutes, since he recalled looking at his watch shortly after leaving the vault and it was approximately 10:30 a.m.

YATES stated he only got a glance at the No. 3 man and recalled seeing this individual with a white cloth, which could be a handkerchief, covering [985] his face from the bridge of his nose down under his chin.

YATES stated he did not observe any unusual or

suspicious activity at the bank in the past which might have some connection with instant robbery.

YATES furnished the following descriptions of the bandits, who, for reporting purposes, are being designated by numbers:

No. 1 Man

Race: Negro

Sex: Male

Height: 5' 10"

Weight: Unknown

Age: Unknown

Build: Slender

Complexion: Very dark for negro

Peculiarities: Worn horn-rimmed glasses, no mask, very calm.

Weapons: Not observed, only saw him above top of tellers' counter.

Clothing: Blue suit; grey felt hat with dark band, red feather; shirt and tie unknown.

No. 2 Man

Race: Negro

Sex: Male

Height: 5' 11"

Weight: Unknown

Build: Slender, athletic type

Complexion: Dark for negro

Age: Unknown

Hair: Normal, kinky, slightly receded forehead.

[986] Weapon: 45 automatic pistol in poor condition.

Peculiarities: Very nervous from actions and speech and he kept repeating commands.

Clothing: Work-type clothes—white T-shirt, khaki chino pants, no mask, tried to conceal face by pulling up his T-shirt; carried

peaked-type zippered briefcase, saddle brown in color.

No. 3 Man

Race: Negro

Sex: Male

Height: Same as No. 2 man

Weight: Same as No. 2 man

Clothing: White handkerchief as mask; blue work shirt, hanging outside of his trousers; believed to be wearing white work clothes."

The Court: Now I may say to the prosecutors and attorneys for the defendants, that where you have offered as exhibits and read certain documents, naturally they go into the jury room if and when the case has reached the jury; so there will be no necessity for passing them around the jury—you will have them there to refresh your recollection.

Mr. O'Donnell: In that instance there should be a staple affixed to the three parts.

Mr. Koen: Four parts.

[987] The Court: I think they are numbered consecutively anyway, aren't they?

Mr. O'Donnell: Yes, they are.

Redirect Examination by Mr. Koen

Q. Now, Mr. Yates, in the statement which I have just read from you have referred to the No. 2 man. Is that correct—in the statement? A. Yes.

Q. Do you now know the name of the man whom you described on that day as No. 2? A. I do.

Q. And who is the man whom you described on the 18th day of July, 1957, as the No. 2 man? A. His name?

Q. Yes, please. A. Arnold Campbell.

Q. All right, sir.

The Court: By Arnold Campbell, whom do you mean?
Do you see him in the courtroom?

The Witness: Yes, sir.

The Court: Where is he?

Mr. Koen: Stand up, please.

[A defendant rises.]

A. That man standing up.

Q. Is that the man whom you described in this statement as the No. 2 man? A. It is.

Q. Now, sir, going back to the testimony that you gave to us, you described a No. 3 man leaping over the partition and landing on the desk, and after this incident did you observe the condition of the desk and typewriter attached to the desk? A. I'm afraid I do not connect it with the same desk.

Q. Well, then, maybe I misunderstood you, and I'm glad I asked the question, sir. After the incident described by you as having happened on the 18th day of July, you made some reference to the condition of a typewriter? A. Yes.

Q. Is that correct? A. Yes.

Q. Now where was that typewriter located which you examined after this incident? A. Behind No. 3 desk from this wall [pointing].

Q. And, sir, was that the desk at which you were working prior to the happening of this incident? A. Yes, sir.

Q. And, while we are on that subject, sir, if you were sitting at that desk that morning using that typewriter, shortly after 10:00 o'clock: with reference to the left wall of the bank how would you be sitting in relation to the desk? A. Over here [pointing].

Q. Yes. A. Facing this wall.

Q. And your back would be to what portion of the bank? A. To the tellers' cages.

Q. And would your back have been to the public space or the customers' area? A. It would.

Q. Now will you describe the condition of the typewriter on the desk which you were using that morning, after this incident? A. The several keys of the typewriter were pressed down and jammed together in such a manner that they wouldn't release without a vigorous effort to do so.

Q. Were those keys in that condition, sir, at the time you left your desk to go over to the cage? A. They were not.

Q. By the way, sir, when you left your desk that morning to go over to answer the noise which you heard at that gate, did you at that time have a chance to observe the man who was standing at that gate? A. I did.

Q. And did you observe him, sir, during the time that you traveled from your desk to the gate and spoke to him? A: I did.

Mr. O'Donnell: I object.

The Court: I allow it.

A. I did.

[990] Q. Now, with reference to the statement which has been read in evidence, or the document which has been read in evidence, can you tell us who the man was standing at the gate that morning to whom you spoke?

Mr. O'Donnell: Objection.

The Court: I allow it.

A. His name?

Q. Yes, please. A. Arnold Campbell.

The Witness [to the Court]: Is this working [indicating microphone]? It isn't working.

The Court: Oh, isn't it? No, I think I did it myself, unintentionally.

Q. At the time, sir, that you observed him when you were walking from your desk to talk to him at the gate following hearing the rattle, was his face visible to you, or, to put it another way, was there anything covering his face? A. There was nothing covering his face.

Q. Now I think you said, sir, that at some time during the course of this event on the morning of July 18th, the man whom you met at the gate assumed a position between two filing cabinets which were in the officers' quarters. Is that right? A. It is.

Q. While the man was in that position, sir, in the area between those two filing cabinets, were you able to observe the man and his activities at any time during that period he was in that section? A. Out of the corner of my eye, yes. Movements.

Q. Now, sir, from the position that you maintained at a point near your desk, were you able out of the corner of your eye to see any part of the customers' area? A. Briefly, yes.

Q. Now, sir, this man whom you described as the No. 1 man, did you observe him during the incident described? A. Yes, I did.

Q. In what area of the bank did you observe him that morning, sir? A. Up against the right door jamb with the light switch on it at the inside entrance to the bank.

Q. Now, sir, the No. 1 man as you have described him, or, as he has been described in this report,--was he the man who was wearing the blue suit? A. He was.

Q. Now, sir, I show you the Defendants' Exhibit A-1, and I will ask you if you have read that, sir? A. Yes, I have.

Q. Now I ask you, if you will, sir, to step down from the stand and tell me, sir, if there's anybody in the courtroom who resembles the No. 1 man referred to in your statement made on July 18th?

Mr. Louison: Objection, your Honor. This is not direct.

The Court: I'm allowing it.

Mr. Louison: It is not direct.

The Court: I'm allowing it. Your associate had a long cross-examination. I'm allowing it. Go ahead.

Mr. Koen: This is the result of this exhibit which has been admitted.

The Court: That's right. I'm allowing it. Go ahead.

The Witness: May I ask for the question again, please?
[Last question read.]

The Court: That's the statement you have just read, isn't it?

Mr. Koen: No, that's the statement which I read to the jury, sir.

The Court: Is the statement in front of him now?

Mr. Koen: No, sir, I shall give it to him [handing to the witness].

[After perusing statement, the witness leaves the stand and approaches the end of the bar.]

Mr. Louison: He wasn't asked to point anybody out at this time, your Honor.

Q. Will you—is there somebody in this courtroom who resembles the man you described as the No. 1 man? A. There is.

Q. Will you point him out, sir? A. This man here [indicating].

Mr. Koen: Will you stand up, please, sir?

Mr. Louison: Objection.

[A defendant rises.]

Mr. Koen: May the record show the witness is pointing to the defendant Alvin Campbell as the No. 1 man.

Q. All right, sir. Please take the stand, please. [Witness returns to stand.] So that it will be clear at least in my mind, sir, you were asked certain questions on cross-examination with reference to the time when you saw some people, I think it was, at Boston Police Headquarters. Am I right? You were asked some questions about them?
A. Yes.

Q. Let me ask you this specific question, if I may, sir. In the group of people that you saw on that occasion, was the man Arnold Campbell present at that time, sir?

Mr. Louison: Objection.

The Court: I allow it.

A. Not to my recollection.

Q. Fine. Now, sir, was there present at that time anybody else whom you see today in this courtroom? A. Yes.

Q. Will you indicate who else was present who is today in the courtroom on that occasion, sir?

Mr. Louison: Objection.

The Court: I will allow it.

A. By name?

Q. Well, you point him out to me, sir, and— A. The man that I just pointed to, and the one next to him.

Q. Now let's take them one at a time. [To a defendant] Will you stand up, please, sir?

Mr. Louison: Objection.

Mr. Koen: There has been an objection, sir.

The Court: I'm allowing it.

Q. Did you see that man there that morning? A. I believe I did, yes.

Mr. Koen: May the record reflect that the witness has indicated Arnold Campbell—Alvin Campbell. I'm sorry. Will you be seated, please, sir.

Q. Now you say you also saw somebody else on that morning? A. Yes.

Q. And whom else do you see in this courtroom today whom you saw on that morning? A. The man in the middle.

Mr. Koen: Will the man in the middle please stand up so the jury may see him.

Mr. Louison: Objection.

The Court: Now I am going to instruct the jury that the witness has indicated two men, but no reference is to be

drawn against any of them because they were in the lineup, because they were in that lineup, arising out of his testimony, arising out of this witness' testimony.

Mr. Koen: I think there was objection to the question, your Honor.

The Court: There was; and I have already allowed it. Has that statement satisfied you, Mr. O'Donnell?

Mr. O'Donnell: In that regard, yes, your Honor.

The Court: All right.

Q. The man who was in the middle, sir, is now standing. Did you see him on that morning? A. In the lineup, yes.

Mr. Koen: May the record reflect that the person standing up is the defendant—

The Court: It already reflects that.

Mr. Koen: Beg pardon, sir?

Mr. O'Donnell: The record already shows that fact.

Mr. Koen: I want to be sure it does.

The Court: I don't know. I think it shows it on Arnold. But the statement I made applies to both.

Mr. Koen: May the record now reflect whether that is the man?

The Court: That's right. I only do that for the purpose of having the record show who was referred to so that it will be able to translate it into some name. That's the only value it has, one value that it has.

Q. Now, sir—

The Court: What I meant to say was, the appearance of someone in the lineup is no indication in and of itself of complicity with guilt in connection with the violation of a penal statute. You notice the way I said that: in and of itself. I want you to appreciate that limitation I put in there.

Q. Now, sir, having in mind your last statement that you had selected the man Donald Lester in the lineup that morning—

Mr. O'Donnell: I object to that phraseology.

The Court: I don't think you are harmed by that statement to the jury, Mr. O'Donnell. I don't want to repeat it.

Mr. Koen: Well, I will withdraw it.

The Court: All right.

Q. Having in mind your testimony here just this moment, in reference to this defendant Donald Lester, and having in mind what happened at the lineup, sir, tell me this. Had you seen the man whom you now know as Donald Lester, in the Canton Bank on the 18th day of July, 1957, to the best of your ability today?

Mr. O'Donnell: I object.

The Court: No, I allow that.

A. Do I understand prior—had I seen him prior to that time?

Q. No, sir. I am asking you if, having in mind what has happened here this morning, can you tell us now, sir, whether you saw that man Donald Lester in the bank on the 18th day of July?

Mr. O'Donnell: Object.

The Court: I allow it.

A. No, I cannot.

Q. Can you tell us, sir, whether or not the man you now know as Donald Lester resembles a person whom you saw in the bank on that day?

Mr. O'Donnell: Objection.

The Court: I will allow it.

A. I don't believe I had enough recollection of a view of him to say so.

Q. Thank you, sir.

The Court: You mean, from your view of him and your recollection of him you cannot say?

The Witness: No, I cannot.

The Court: [To defense counsel.] You understand what he said? He said that the view he had and the recollection

of his view does not enable him to say that Donald Lester was in the bank.

Mr. Louison: We understood that, your Honor.

The Court: That's right. [To witness] That is from the viewpoint of identification and the viewpoint of resemblance, isn't it?

The Witness: That's right.

Q. Now, Mr. Yates, on the 18th of July you were acting as assistant manager of the Canton Branch; is that correct?

A. I was.

Q. Your regular duty, I think you told us, was that of a note teller? A. That is correct.

Q. Now, sir, on the 18th of July did you have another specific duty with reference to tellers' activities? A. I did.

Q. And was there a tellers' cage assigned to you on that day, sir? A. There was.

Q. What tellers' cage was assigned to you? A. No. 2, which is the spare cage.

Q. And whether or not, sir, you had used Cage No. 2 on that morning? A. Only to set it up.

Q. And what do you mean, sir, by the phrase "set it up"?

A. We, at busy times, use the second cage as a supplementary cage to help during the rush hours, and I had received a sum of money from the head teller that morning so that I could cash checks, whatever business came to the window during rush hours. That consisted of cash of various descriptions.

Q. And after you had set it up, sir, what did you do with your cash drawer in the cage No. 2? A. At all times when we are not there, we are to lock the cash drawer.

Q. And whether or not it was locked, sir, at the time you heard this rattle by Arnold Campbell at the No. 2 gate? A. It was locked.

Q. It was locked? A. It was locked.

Q. And did it remain locked at all times that morning until after you left the vault? A. That's right; yes.

Q. Now, the defendants have offered Government's Exhibit No. A-2, sir. Will you explain that report of the interview? [Witness peruses.] Will you explain that, please, sir? A. Yes. We as tellers have a group of bills that are used as a dummy package, or a decoy package—whatever term, either term, suits—in our currency. They are put in position in the teller's drawer suitable for ourselves in such a way that we will not use those bills. And I had at that time a total \$200, 100 in fives and 100 in tens. The numbers of those bills are listed on a piece of paper. Those are photographed in our Recordak machine; so that we have two means of identifying bills: one with the manager and one with the teller, in case either gets lost. And I had gone on vacation the first two weeks of July. Prior to that time I turned over my cash to Mrs. Milligan, who was to take my place. To the best of my recollection, the serial numbers that I had put aside were still in that cash; and I had come back from my vacation and taken over Miss Smith's position, which is the normal procedure if either Mr. Leonard or Miss Smith go away, so I acted as a substitute at that time because the regular two tellers was ill.

Q. Then, if I understand you correctly, sir, the subject of that report is something which had been prepared and was completed before the date of the happening of this event? A. That is right.

Q. Now I show you, sir, Government's Exhibit No. 20-A-D, inclusive, sir. You have read that before, have you, or have heard me read it? A. That is right.

Q. Now, sir, directing your attention to its content, and directing your attention to the questions that were asked of you on cross-examination, sir—

Mr. O'Donnell: What questions?

Q. —can you tell us now, sir, whether on the date July 18, 1957, in the afternoon, you were shown any photograph by any representative of the FBI? A. Not to my recollection.

Q. And is the document which is now Government's Exhibit 20-A-D, inclusive,—is there any notation in there that photographs were shown to you on that afternoon?

A. No, there is not.

Q. Now, sir, you testified on cross-examination that at a subsequent date photographs were shown to you; is that correct?

[1001] The Court: July 19th.

Mr. Louison: On several dates.

Mr. Koen: Pardon?

Mr. Louison: On several dates.

The Court: No, no, I mean the next date was July 19th, Mr. Attorney. I think he answered it was July 19th.

Mr. Koen: I withdraw the question.

Q. You were asked certain questions, sir, with reference to whether or not photographs were shown to you at a date later than July 18th. Is that correct? A. That is right.

(Now, directing your attention to Defendants' Exhibit A-1, were photographs shown to you on a date subsequent to the 18th day of July, 1957? A. They were.

Q. And among the pictures which were shown to you on that day, sir, did you pick out two men there who you say looked alike or resembled those who are in the bank? A. I did.

Mr. Louison: Objection, your Honor. The document will speak for itself.

The Court: No, I will allow it.

Mr. Koen: I have never heard a document testify yet.

The Court: No, now, I have allowed it to go in. I have allowed the question. Mr. Koen had no right to

interrogate this witness on these exhibits until they were offered. Now [1002] they were offered, I admitted them, they were marked, and he may examine on them.

Mr. Louison: And they have been read to the jury.

The Court: I am going to allow him to do it. Go ahead.

Mr. Koen: They were offered by you, and I have a right to cross-examine on them.

Mr. Louison: They were read to the jury.

The Court: That's right. Go ahead.

Q. Will you answer the question.

The Court: I rule it is perfectly proper to refer to them. And I have also ruled it is perfectly proper for counsel for the defendants to object, and their objections will be noted; but, quite aside from that, they are proper to be answered so far as you fine ladies and gentlemen are concerned. That is the yardstick. I say that with a lot of humility. You have to have some rule, and that's the rule. That is proper on redirect examination. Go ahead, Mr. Koen.

A. Yes, I did, sir.

Q. And which two pictures did you select as lookalikes or resembles, sir?

Mr. Louison: Objection, your Honor.

The Court: I allow it. I am allowing it now and I'll save your objection. Go ahead. A. Arnold Campbell and Alvin Campbell.

Q. Now, sir, there has been read to the jury the last sentence of that report. Will you explain, if you will, please, sir, that last sentence?

Mr. Louison: Objection, your Honor. That's not fair or proper.

The Court: Now pardon me. I'm the one to determine. I don't want any comments, Mr. Attorney—please! That means that if I admit it I'm considered to be unfair.

I'm admitting it. It's a fair thing for me to do, and your objection is noted. That is the way to do it. Please! I don't want to have my rulings minimized by remarks that are quite improper, and that remark was. Your objection is properly noted, and your objection was properly made.

Go ahead, Mr. Koen.

Mr. Koen: So that there will be no misunderstanding as to what portion of this statement I am referring to; Defendants' Exhibit A-1.

Mr. O'Donnell: I object to a prefacing remark in front of a fact-finding jury.

The Court: No, this is the fact-finding—this is a jury sitting, and they're not sitting as a fact-finding; they're sitting in a very solemn deliberation as a part of a modus operandi that means something more than the phrase itself. It's part, quite an intricate part of the modus operandi by which justice is administered. Mr Koen may go along. Go ahead.

Mr. Koen: For the record, then, I am withdrawing what I said.

The Court: No, I'm admitting it.

Q. Directing your attention to the last sentence, Mr. Yates, it reads as follows:

"Yates stated he could not positively identify either Arnold or Alvin Campbell as being participants in the instant robbery."

At the time, on July 19, 1957, sir, pictures were shown to you; is that correct? A. That is right.

Q. And the statement which I have just read to you out of the report, which is Defendants' Exhibit A-1,—will you explain to the Court and the jury what was meant by that statement?

Mr. Louison: I object.

The Court: No, I allow it.

A. These pictures were shown to me, and I believe at that time, to the best of my recollection,—

Mr. Louison: If your Honor please, the question was to explain that sentence.

The Court: He's doing it. The man is giving an explanation. Go along.

A. To the best of my recollection, when these pictures were shown to me I could not positively identify these two men in regard to this particular incident.

Q. Now, having seen the two men in person, as to the man whom you describe as No. 2 man in that report and the man whom you have described as known here as Arnold Campbell, can you now positively identify him as one of the men who were in the bank on the 18th day of July?

Mr. Louison: Objection.

The Court: I allow it.

A. I can.

Q. Now, as to the other—

Mr. O'Donnell: May we have that answer?

The Court: "I can." [To witness] Is there any doubt in your mind that is the man who was in the bank?

The Witness: None.

The Court: All right.

Mr. Koen: That is all.

The Court: I'm going to recess now until quarter-past one.

The Witness: One?

Mr. Koen: Two.

The Court: Quarter-past two.

[Recess from 1:00 p.m. to 2:15 p.m.]

FRANCIS L. YATES, Resumed

The Court: All ready, Mr. Koen.

Mr. Koen: I had finished, sir.

Mr. O'Donnell: Will you come up to the bench.

The Court: [to the jury] You know, when I do this, I do it in order to preserve the rights of the sovereignty of the United States and the rights of these defendants, and to make certain that nothing will happen that will constitute a basis for error. I have no desire to conceal that which you should properly receive. Counsel for the defendants have asked for a conference at the bench, and they have a right to ask for it.

[Conference at the bench, during which the following is recorded:

The Court: Tell me what the subject is.

Mr. Louison: As a result of what happened at the police lineup, defense counsel now make a common law unconditional demand for the stenographer's report of what happened at that lineup just as it was received and is in the possession of the Government agents.

The Court: Mr. Koen has already stated that.

Mr. Koen: No, I haven't stated that. The only demand that was made was covered. The police report was not involved.

[1007] The Court: That's right.

Mr. O'Donnell: It was admitted.

Mr. Koen: It was not admitted.

The Court: You brought it out on recross, and there is the right of the Government to inquire. You can't bring out something on cross-examination and then deprive the Government of the right to interrogate.

Mr. O'Donnell: We have no such intention.

The Court: No, I'm going to deny it. There's a way to do that, but I'm not going to do it under these conditions. I'm denying the request. I'm denying it without prejudice, Mr. O'Donnell, to your right

to renew it later on and under other conditions. I take it, Mr. Koen, since this is a common law demand or a demand if even if you had the paper doesn't—

Mr. Koen: I don't have to comply with it.

The Court: That's right, you're not complying with it, and I don't order you to do it; and when I don't order the Government to do it, or the defense, it means de novo.]

Mr. O'Donnell: May we have the exhibits that were introduced this morning? [Handed.]

Recross Examination by Mr. O'Donnell.

XQ. Mr. Yates, I show you Government's Exhibit No. 20-A-D, and would you please look at that exhibit [handing]. [Witness peruses.] I ask you whether or not, sir, your testimony regarding Arnold Campbell—what number man do you have him as? A. That is No. 2 man.

XQ. Now, at that time, at the time of the interview with Leonard Frisoli on July 18, 1957,— A. Yes.

XQ. —at that time you gave him some sort of description for the No. 2 man, sir? A. I did.

XQ. Now, sir, whether or not you recall yesterday, on cross-examination by me, indicating that the person you called the No. 2 man had a mustache on? A. Right; I did, yes, sir.

XQ. And that's clear in my mind, that you told me that yesterday. Now, sir, I show you Government's Exhibit 20d, wherein your description of the No. 2 man was given as recorded by FBI Agent Leonard Frisoli on July 18, 1957. I ask you to examine it. [Witness peruses.] Have you examined it, sir? A. I have.

XQ. Is there anything in there referring to a mustache? A. No.

XQ. Now, for the record, Mr. Yates, just before we recessed for lunch, you were asked a question

on direct examination by Mr. Koen about your ability to make an identity, and it was the last answer that you gave. Is it a fact that the first answer you gave to that question in this courtroom was, "I can't say positively"?

Mr. Koen: Now wait a minute, please.

The Court: Yes, wait a minute.

Mr. Koen: Please, now. Do you mean the last question and then the first answer? I think the question is objectionable, and I do object.

Mr. O'Donnell: I think that is a clear question.

Mr. Koen: Now, please, my objection. Has the Court instructed? Don't characterize what I said.

The Court: The one that asked the last question before the recess was myself. I asked the witness a question before the recess.

Mr. O'Donnell: I asked about the last question by Mr. Koen:

The Court: With reference to which defendant, do you mean?

Mr. O'Donnell: Arnold Campbell.

The Court: Now would you read that last question by Mr. O'Donnell:

[The following question is read:

"Q. Now, for the record, Mr. Yates, just before we recessed for lunch, you were asked a question on direct examination by Mr. Koen about your ability to make an identity, and it was the last answer that you gave. Is it a fact that the first answer you gave to that question in this courtroom was, 'I can't say positively?'"]

Mr. Koen: I don't understand that question, sir.

Mr. O'Donnell: Are you making an objection?

The Court: Well, it's for the jury to say what the testimony was; but the man was asked to go downstairs, to go down there, according to the testimony, and pick

out a man that came through the door which he opened and under circumstances which indicated the presence of a gun, and he opened it and put his hands on Arnold Campbell. Isn't that right?

Mr. O'Donnell: I object.

The Court: Well, didn't he do that?

Mr. O'Donnell: That isn't the sequence of what happened, your Honor.

The Court: That was the first thing he did in his direct testimony. Now, if there is anything that was brought out by Mr. Koen on redirect, I am going to allow you to recross on it; if it wasn't, I'm not going to permit it. I'm going to limit recross, I'm going to invoke the Federal rule on this recross and redirect.

Mr. O'Donnell: I want it known if the—

The Court: Your questioning me now. Probably the witness doesn't understand it. [To witness] Do you understand it?

The Witness: I do not, no.

Mr. O'Donnell: All right.

XQ. In answer to Mr. Koen's question when he asked you for a positive identification after showing you Defendants' Exhibit A-1, you were asked for an answer as to what you could today do positively. My question is, did you answer that first of all, "I can't"?

Mr. Koen: When, today? Objection. I talked about today.

The Court: That's right.

A. The question that I was asked by Mr. Koen—

XQ. Can you recall what Mr. Koen asked you?

The Court: The witness was asked and interrogated with reference to his answer that he made about the photograph that was shown him on the 19th of July, when he gave a description of the man and said that one resembled Campbell but he couldn't identify him; later

on, the last question was, he had no doubt in his mind, and he testified on direct that he was, and the weight of it is for the jury. Your memory controls. Is there any dispute over that? Is there any dispute that this man has picked out Arnold Campbell as the man who stood in front of him with a gun and directed him to do certain things? Is there any dispute over that?

Mr. O'Donnell: Naturally, your Honor—

The Court: No, is there any?

Mr. O'Donnell: There is in my mind.

The Court: All right, there is. [To witness] Is there any doubt in your mind that that is the man you testified to?

The Witness: No.

The Court: That is the man that stood in front of you with a gun?

The Witness: No.

The Court: There's the answer.

Mr. O'Donnell: I object to your Honor's comments.

The Court: I'm objecting to your misquoting the testimony. That's your objection, isn't it, Mr. Koen?

Mr. Koen: Yes, sir. In fact, I think it's a double-barrel question, to boot.

The Court: Now you can cross-examine him to your heart's content on his methods he used to identify him. I've given you full opportunity to do it. I'll give it to you again, Mr. O'Donnell. I'll be glad to do it. I'll raise that rule and give you a chance to do it again. But I wish you would try to get along. Let's get along with this trial. This man has been on the witness stand for a long while now.

XQ. Mr. Yates, when you viewed the lineup on the day you have told us about, were there any white people in the lineup?

A. Yes, I believe there were.

XQ. Are you certain about that? A. Yes.

XQ. Is it fair to say that the majority of the people in the lineup were white? A. As I recall, about equally divided.

XQ. Now, sir, isn't it so that at the lineup you had someone other than Arnold Campbell as the No. 2 man? A. Arnold Campbell was not in that lineup.

XQ. Did I say that Arnold Campbell was in the lineup, Mr. Witness? A. No. Perhaps if you said that again--

XQ. Can you remember my question, Mr. Witness? A. Not entirely.

XQ. All right. Whether or not at that lineup, wherein you have already identified for the Court and jury that Alvin Campbell was present and Donald Lester was present—is that a fair statement? A. Yes.

XQ. —whether or not at that time you selected someone other, for the moment, than Arnold Campbell as No. 2 man? A. No, I did not.

The Court: Obviously he didn't, because Arnold Campbell wasn't in the lineup, Mr. Foreman and ladies and gentlemen of the jury, and the other two were, and the witness said he picked two men out. He picked Alvin Campbell and he picked Lester, the two men that looked like—

Mr. Louison: I object, your Honor.

The Court: That's exactly what he said

Mr. Louison: He said they were in the lineup. He never testified—

The Court: He said they were in the lineup, he said the two of them were in the lineup and the other man wasn't. Let's have that straightened out and go ahead with the cross-examination. I'm not going to allow this jury to be led into any avenue which will cause them any mental consternation because if there is, I'll have all the testimony read to them.

XQ. Now, Mr. Yates, of course—

The Court: Or whatever may seem fit to have read.
XQ. Of course you withdrew from the person you pointed out that morning, didn't you?

Mr. Koen: I pray your Honor's judgment.

The Court: As I remember that lineup, Mr. O'Donnell, let's see if we can agree upon it—

Mr. O'Donnell: Your Honor, I can—

The Court: No, no, as I remember that lineup—

Mr. O'Donnell: I object to your Honor's comments.

The Court: As I remember that lineup, he didn't identify Donald Lester, did he? [To witness] You didn't identify Donald Lester in that lineup as one of the men?

The Witness: He resembled—

[1015] The Court: You never identified him, did you?

The Witness: No.

The Court: And you didn't identify Alvin Campbell in that lineup, did you?

The Witness: No.

The Court: He didn't identify either one of them. There's no dispute about that.

Mr. O'Donnell: On his own testimony he said at one time he identified and then removed himself or withdrew from Donald Lester. He did that here today in court.

XQ. Isn't that so, Mr. Yates? A. Not to my knowledge, to my recollection.

The Court: Well, it isn't to my recollection.

XQ. I'm asking you now whether or not I had Donald Lester stand up in this courtroom today and asked you whether or not for a while at the lineup you had selected him?

The Court: What was his answer?

Mr. O'Donnell: I'm trying to refresh his recollection.

The Court: No, no, what do you say his answer was? What do you say his answer was?

Mr. O'Donnell: Your Honor, in my best memory his answer was, Yes.

The Court: His answer was, No. Was he in the lineup? Was he in the lineup?

Mr. Koen: No, he's talking now about Donald Lester.

The Court: Oh, Donald, Donald Lester. I'm talking— [To witness] Donald Lester was in the lineup, wasn't he?

The Witness: He was.

The Court: Did you identify him positively?

The Witness: No.

Mr. O'Donnell: I didn't say he identified him positively. I say that he did indicate him and then withdrew from the indication.

XQ. Isn't that so, Mr. Yates?

Mr. Koen: Wait a minute. What do you mean by "withdraw"? I object.

The Court: I don't know what he means. Mr. O'Donnell, go ahead and examine.

Mr. O'Donnell: All right.

The Court: To your heart's content. I'll give you a chance on redirect, Mr. Koen.

XQ. You saw Donald Lester there; is that so, Mr. Yates? A. Yes.

XQ. And for a while at that time you indicated Donald Lester; that's so, isn't it? A. As a resemblance, yes.

XQ. And then you withdrew from that position; that's so, isn't it? A. That's right.

XQ. Before you left the lineup?

A. Before we left.

XQ. And at that time that was, No. 2, was it? That's so, is it? A. No.

XQ. Now, getting over, Mr. Yates, to your position on July 18th, when you told me yesterday that outside of going to a phone where no one was on the line and

going to the gate when you saw the No. 2 man, that you were standing in this position facing generally on an angle through the main booth and toward the vault; that's so, isn't it? A. Yes.

XQ. And you told me at that time that your observation consisted of, one of the gate, one at the desk where you were making answer to the phone calls, one out the corner of your eye between the filing cabinets; isn't that so? A. So far, yes.

XQ. Have we summed those up? A. Yes.

XQ. Now, as a result of redirect examination by Mr. Koen, you now say that you had a look at the man in the blue suit out the corner of your eye? A. I saw the man in the blue suit, yes.

XQ. And was it out of the corner of your eye? A. I don't recall the exact time at which I saw him, but I do recall seeing him against that marking to the right of the word "Entrance" there.

XQ. You are not going to say now you saw him when you approached this gate, are you? A. I cannot say when I saw him.

XQ. So that you didn't have much of a look at him; that's so, isn't it? A. I had enough to recall the description I gave you.

XQ. Sir, I'm asking you, long shot, sir, how much of a look did you get of this so-called No. 1 man?

Mr. Koen: He has already answered that.

The Court: I think he has answered it.

XQ. What's your best estimate of the time?

The Court: He's already answered.

XQ. Can you fix the time when you got this look? A. How long does it take to take a glance? That's it.

XQ. Of course I don't answer questions, Mr. Yates. A. I looked up and I saw him.

XQ. You took a glance; is that right? A. I did.

XQ. Can you fix the time as to how long it takes you to take a glance? A. No.

XQ. You took a glance? A. Yes.

XQ. You are fixing the time as how long it takes to take a glance; right? Isn't that what you said? A. Yes.

XQ. All right. So, taking a glance by looking ahead, how would you fix the time? A. I don't know.

XQ. All right. So that, as you stated previously that you walked from here over to the end of the vault and during that stroll or march, as Mr. Koen indicated, whether or not you saw anyone?

Mr. Koen: Wait a minute, please. My objection is, this is not a matter that was brought out by me.

The Court: Why isn't that so?

Mr. O'Donnell: I object, because he went into the identity of No. 1.

The Court: He went into identity because you put the records in.

Mr. O'Donnell: I didn't put them in.

Mr. Koen: For the record, I put those records and reports in, sir.

The Court: That's right. You put them in after they had been asked for, and very properly so, by counsel for the defendants.

XQ. Now, whether or not, Mr. Yates, when you returned back to the lineup on Donald Lester, whether or not at that time you had in mind the No. 1 man? Yes or No.

Mr. Koen: I pray your Honor's judgment.

The Court: Read the question.

Mr. Koen: I don't know what the question means.

The Court: Read the question.

[Question read.]

The Court: Will counsel come up a minute. I don't know what it means. Come up.

[Conference at the bench, during which the following is recorded:

The Court: It is quite obvious that lineup at the police headquarters, that when you have a lineup it doesn't indicate a man is No. 1 or No. 3. The lineup was entirely different than the final judgment this man has expressed. The first man is Alvin and the second man is Donald Lester, but the other fellow wasn't there.

Mr. O'Donnell: My question, I respectfully say, made it clear it was Donald Lester.

Mr. Koen: No, it didn't.

The Court: No, you didn't.

Mr. Louison: If your Honor please, the reference to numerals now are those introduced in the statement which was introduced by the prosecution as an exhibit and not to the report.

Mr. Koen: Let's have it clear.

The Court: Let's have it clear. I don't mind that. The reference to No. 1 is the reference to the lineup at police headquarters.

Mr. Louison: No, it's the reference to the statement, the description of No. 1 man, 2, and 3 man.]

The Court: [to witness] When you referred to the No. 1 man in the lineup or any other place in the lineup, whom did you refer to? No. 1?

Mr. O'Donnell: I object to your Honor's comment.

The Court: Well, I'm asking him the question. I'll let you ask it.

XQ. Look, Mr. Yates, having reference to that exhibit I showed you—

The Court: Now will you please ask that question that I was going to ask, or I am going to ask it.

Mr. O'Donnell: All right. May I have that—

The Court: Mr. Witness, I've given counsel a chance to ask it.

Mr. O'Donnell: I believe I have it.

The Court: At the lineup, when you referred to No. 1 and No. 2, who did you mean of these defendants?

Mr. O'Donnell: I had in mind No. 1, 2 and 3 that he had in Mr. Koen's examination.

The Court: I'm asking you now, who did you mean?

The Witness: The No. 1 man to me means the man in the dark blue suit.

The Court: Who was that?

The Witness: Mr. Alvin Campbell.

The Court: And who was the other one?

The Witness: No. 2 man is Arnold Campbell.

The Court: All right.

XQ. Now, sir, as to Nos. 1, 2 and 3 men that the descriptions, what they are, were shown on Government's Exhibits 20-A-D, you say that when you looked at the lineup, you have already told us, you didn't have in mind on your conditional selection of Donald Lester the No. 2 man as it appears in this Government exhibit. I now ask you, as the numbers appear in Government's Exhibit 20-A-D, whether or not you had in mind the No. 1 man?

Mr. Koen: When?

Mr. O'Donnell: At the lineup.

The Court: The lineup at police headquarters?

Mr. O'Donnell: At police headquarters.

A. I believe it was the No. 1 man that I had in mind.

XQ. So that—

The Court: Did you prepare that No. 1, 2 and 3?

The Witness: No.

The Court: That was prepared by the FBI, wasn't it?

The Witness: That's right. For purposes of distinguishing between three.

XQ. And you adopted using the figures No. 1 and 2 in your testimony? A. At the suggestion of the Agent, to specify the different men.

XQ. Yes. A. That's right.

XQ. All right. Can you fix the month of the year 1957 when you were at the lineup? A. To the best of my recollection, I believe it was sometime during the second week of September. I'm pretty certain it was after Labor Day.

XQ. And, of course, Mr. Yates, at that lineup at the Boston Police Headquarters, it is fair for me to say that the only selection that was later withdrawn in view of the lineup when you viewed it was on Donald Lester?

A. That is right.

XQ. So, sir, I show you Defendants' Exhibit 1-A.

The Court: Mr. O'Donnell, do you contend this witness had anything to do with the choice of those that appeared in the lineup?

Mr. O'Donnell: I'll answer that question at the bench.

The Court: You will answer that question now. Answer it right in the presence of the jury. Do you contend this man, this witness, had anything to do with the picking of those that were in the lineup?

Mr. O'Donnell: The picking, how they were chosen—

The Court: You answer that question Yes or No, because I'm going to let you make some inquiries. I'm asking you that so I'm going to determine—

Mr. O'Donnell: I have no personal knowledge, your Honor; but I think it is a very legitimate inference that the Lieutenant that was in charge has the choice.

The Court: Very well. Then your answer is, this man had nothing to do with the picking of those in the lineup.

Mr. O'Donnell: In the absence of personal knowledge. I would say the Police Department or the Federal Bureau governed that lineup.

Mr. Koen: May I say the Federal agents were not—

Mr. O'Donnell: As to where they were standing.

The Court: Mr. Yates, did you have anything to do with picking any one of the men who were in that lineup?

The Witness: No, sir.

The Court: Of course not. All right.

XQ. Do you recall an interview with Leonard Frisoli of the FBI, when you described these men, using the expression that they were very dark for a negro, as to No. 1 man? I show you Government's Exhibit 20-C. A. I do.

XQ. As the result of being here in the courtroom, sir, would you change that now? A. Slightly, yes.

XQ. And, sir, as to No. 2 man, whether or not you made it a point to say, "Hair: Normal, kinky, slightly receded at forehead"? A. Yes.

XQ. Whether or not, sir, you estimated the age of No. 2 man? A. No, I don't believe I did, or any of them.

XQ. Now, Mr. Yates, I show you. Defendants' Exhibit A-1 and ask you to read it. A. [After perusing] Yes.

XQ. That is the interview that you had with Agent Frisoli on July 19th at the Norfolk County Trust Company?

A. No, it is not.

XQ. Would you say then that the report here, saying that there was an interview with Francis L. Yates on July 19, 1957, at the Norfolk County Trust Company, Canton, Massachusetts, by Special Agent George R. Mowbray—Did I use the name Frisoli? A. Yes.

XQ. So I substitute the name Agent Mowbray. That's an accurate account of the interview? A. I believe it is, yes.

XQ. And at that time, sir, it is so, in reading it, that Yates stated he could not positively identify either Arnold or Alvin Campbell as being participants in instant robbery; that's so as of July 19, 1957, isn't it? A. According to this, yes.

The Court: He testified it was so. He already testified to that. He said he couldn't.

XQ. As a matter of fact, as of July 19, 1957, sir, there is no doubt in your mind that that is so? A. As is stated here, yes.

XQ. And as you knew it to be.

The Court: As of that date.

A. Positively identify, yes.

XQ. As of that date. A. That's right.

XQ. As related to Special Agent Mowbray? A. That is right.

The Court: What he said was, he couldn't positively identify him on that day. Isn't that what you said?

The Witness: That's right.

The Court: That's the very word he used. And that was the day after the holdup?

The Witness: That's right.

XQ. And now, Mr. Yates, following the interview with Mowbray, when you made the statement that you could not positively identify either Arnold or Alvin Campbell,—following that period of time you met with other agents; that's so, isn't it? A. Yes.

XQ. And you discussed various phases of your experiences on July 18, 1957? A. Yes.

XQ. And now, going back and arriving here yesterday afternoon, do you recall his Honor directing you to go home and think over an answer that you were going to give to the Court in the morning?

The Court: Now I—

Mr. Koen: I object.

The Court: I beg your pardon, Mr. O'Donnell. That was in the absence of the jury, and you have no right to violate it.

Mr. O'Donnell: I have—

The Court: Now wait a minute. Now Mr. Foreman, ladies—

Mr. O'Donnell: I object to the comments.

The Court: You sit down until I finish talking.

Mr. O'Donnell: I object.

The Court: At that time, Mr. Foreman and ladies and gentlemen of the jury, you remember I excused you, and I spoke to you about this new statute afterwards and told you I was going to have an examination outside the hearing of the jury, to determine whether or not the defendants should be entitled to have these copies which I decided today they should have, and I asked this witness to go home and ask certain questions, and I am not going to permit you to interrogate this witness in a matter which becomes the subject of a voir dire examination by me up at this bench because you have no right to it.

Mr. O'Donnell: Well, your Honor—

The Court: I forbid you now from asking any question that involves the sacred nature of a discussion at this bench away from the jury at a time when the Court was going to preserve the rights of your clients. Now, I've made that ruling, and you can have your objection, and that's sufficient.

Mr. O'Donnell: Right.

The Court: That question was a most improper one for you to have asked this witness. The jury may disregard it, and please do not hold it against these defendants.

Mr. O'Donnell: I object to that because I understand it came up this morning.

The Court: It didn't come up this morning. The question never came out. It came out here at the bench this morning. I had interrogated, and I decided in your favor. I demanded the Government to turn those records over after hearing it. That's what I did. I asked this witness

to go home and do certain things which would enable him to give me the answers which he gave me this morning, as a result of which you got those papers, and if he hadn't given me the answers you wouldn't have.

Mr. O'Donnell: The very fact is, your Honor, my question wasn't probing into that aspect. I was talking—

The Court: Well, the question that was asked leaves this Court in an unpleasant position, and I don't think it is right to do those things. I did that in a spirit of fairness and in deference to the rights of your clients, and out of the deference also to the rights of the United States, in connection with a statute passed by Congress, one which has never been judicially determined, and I had to rule on it. I have ruled on it in your favor. I construed a penal statute strictly in favor of the defendant.

XQ. Now, Mr. Yates, whether or not, with respect to Arnold Campbell when you took a trip to Cambridge to view him, at those times, the periods while you were with the Federal agents, they told you about the individual, Arnold Campbell?

Mr. Koen: My objection.

The Court: What is the objection?

Mr. Koen: My objection is this. The question embraces a matter that I did not cover in my redirect examination, a trip to East Cambridge. I didn't touch that on redirect.

The Court: I think it was brought out by you, Mr. O'Donnell, that they went to East Cambridge. If we get into East Cambridge, I don't know where it leads to. I haven't any idea what it means. Do you expect to prove that the agents of the Federal Bureau of Investigation framed this witness to identify these—

Mr. O'Donnell: I object to this.

The Court: No, I mean—that is what it means, doesn't it? They prevailed upon him to pick this man out, Arnold Campbell, as the fellow that he has already identified?

Are you going to do that? I am going to let you go right into it now.

Mr. O'Donnell: Yes. Well, he has had a change of heart since.

The Court: I am going to order the Federal agents here, Mr. Koen.

Mr. Koen: Now wait a minute. I ask that last remark be struck out.

The Court: What was it?

Mr. Koen: There's been no change of heart or change of anything.

The Court: Oh, that's a wrong thing to say when you're talking about a Federal agent. You can argue that. You argue that and I'll comment to this jury.

Mr. O'Donnell: Your Honor,—

The Court: I want the jury to ignore it. A man sits down today and sees a picture and then he's brought in a little later on, and it's for the jury to say whether or not this witness, in the exercise of his obligation to his sovereignty, has enlarged upon the truth, has exaggerated, or whether he's the kind of a witness the jury can rely upon. That's a matter solely for this jury, and it isn't for you to comment to say he has changed it.

XQ. Well, Mr. Witness,—

The Court: That remark may be stricken out, and that remark may be thoroughly disregarded by this jury. That's the better way to leave it. It was better left unsaid.

Mr. O'Donnell: In connection with your Honor's remarks about Federal agents—

XQ. Whether or not when you viewed Arnold Campbell in Cambridge there was an entire cage covering Arnold Campbell, a wire cage? A. There was.

XQ. Did you find that highly suggestive toward your making the identification that influenced you, in those circumstances? A. No, it did not at that time.

XQ. At that time it did not? A. No.

XQ. Something happened later that influenced you?

A. I'm sorry. No.

Mr. O'Donnell: That is all.

Mr. Koen: I may be laboring the point, but in view of the statement that was made, I would like to ask Mr. Yates this question.

Redirect Examination by Mr. Koen

Q. Is there any doubt in your mind that the man you have pointed out here today as Arnold Campbell is the man who was crouching in between those two filing cabinets in the Canton Branch of the Norfolk County Trust Company on July 18, 1957?

Mr. O'Donnell: I object if he now includes the 18th with the 19th.

The Court: He will ask him, as of today.

Mr. Koen: I press the question.

The Court: You are entitled to have it.

A. As of today, there is no doubt.

The Court: And that is your final judgment as to a man that had a gun up to you in that bank?

The Witness: Yes.

Mr. Louison: I object, your Honor.

The Witness: Yes.

Mr. Koen: Now could I have my question answered?

The Court: He answered it.

Mr. Koen: Oh, I'm sorry. I didn't hear it. That's all.

The Court: Is that all?

Mr. Koen: I have no further questions of this witness, your Honor.

Mr. O'Donnell: I don't know whether I have any further questions of this witness, whether or not he may be excused.

The Court: No, I'm going to order you to finish your cross-examination of this witness. He's been on here long

enough, and if you need him later on you can—if you need this witness as a witness—

Mr. O'Donnell: All right.

The Court: —you can subpoena him.

Mr. O'Donnell: All right, your Honor.

The Court: Now, will counsel come up here. You know that's the proper way to do it.

Mr. Koen: May Mr. Yates be excused, sir?

The Court: Mr. Koen wants to have Mr. Yates excused. I don't want to have a man stay here that has work to do, when there is no occasion for it. Mr. O'Donnell, if you want this witness brought back at any time, I will bring him back.

[Discussion at the bench, not recorded.]

The Court: Are you finished with this gentleman?

Mr. Koen: Oh, yes.

The Court: Are you, sir?

Mr. O'Donnell: Yes, your Honor.

The Court: Thank you, Mr. Yates.

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DOMINIC STAULA, Sworn

Direct Examination by Mr. Koen

Q. What is your name, sir? A. Dominic Stala.

Q. St-a-u-l-a? A. Yes.

Q. And where do you live, Mr. Staula? A. 259 Highland Street, Stoughton.

Q. And by whom are you employed? A. I am self-employed.

Q. And how long have you been self-employed? A. Since May of this year—pardon me, that is May of last year, 1957.

Q. And what is the nature of your business? A. I do plumbing and heating work.

Q. Directing your attention to the morning of July 18, 1957, were you in the vicinity of the Canton branch of the Norfolk County Trust Company? A. Yes, I was.

Q. By the way, are you a customer of the bank? A. Yes, I am.

Q. And on the morning of the 18th, did you arrive in the vicinity of the bank on foot, or just how?

A. I drove there in my truck.

Q. Now, where did you park your truck, sir? A. In the driveway on the side of the bank.

Q. Now, did there come a time when you left your truck and went into the bank premises? A. Yes.

Q. When you entered the bank, what did you do on that morning? A. When I first entered the bank, I walked over to one of the desks and made out my deposit slips. From there I walked over to the teller's cage, it was the second cage in from the door, and I was standing there waiting to be waited on, and there was someone in front of me, when I noticed that the next cage was empty. That was Mr. Kennedy's cage, the first cage from the door as you enter.

Seeing the cage empty, I walked over to that one and I was standing there waiting for Mr. Kennedy to return to his place.

Do you want me to keep on?

Q. Yes, go ahead.

The Court: Now, Mr. Staula, will you speak up, please?

The Witness: I was standing at the cage and I was absorbed in looking over my deposit slips to see whether I had made them out right or not, when I heard a voice beside me telling me to get over against the wall. And hearing that, I

turned around and I was looking at a man holding a gun pointed at me, and he said, "Get over against the wall, or we might have to kill somebody."

And upon hearing that, I turned around and walked over to the opposite wall with my hands raised, and I was standing in that position. And while I was standing there and people kept coming in the door, one of the fellows

was standing behind me and he would grab them as they came in—do you want me—?

Q. You keep right on going and tell what happened that day. A. In the meantime, there were two other fellows, two of the other fellows that were robbing the bank, over behind the cages. The reason I knew there were two was—

Mr. O'Donnell: Objection.

The Court: You don't deny that that bank was robbed by somebody?

Mr. O'Donnell: Factually. As to the legal determination, no.

The Witness: The reason I knew there were two behind the cages, there was one fellow standing behind me. I could see one from the side view, and he was talking to another fellow behind the cages which was not the one standing behind me, and they were talking back and forth.

The Court: What was the conversation between them?

The Witness: Well, at first the conversation was behind me, they were telling the tellers to open various drawers, and so forth, and then they wanted the teller to open the vault. The teller told them they couldn't, it was time-locked, and they threatened him and made them open it, and that was when I saw one of the fellows over there by turning my head a little sideways, emptying the money into a paper bag, and they were talking back and forth.

In the meantime, as the people would come in the door, the fellow behind me would step out from the side and point a gun at them and make them get over against the wall.

And when the cop came in, he did the same procedure, he stuck the gun in his back and told him to be a good cop and not to try anything, not try and be a hero or he would have to kill him.

During the conversation, after a few minutes one of the

fellows called one of the others by his name, he says, "Come on, Duke, hurry up". And after they were all done there, they took all of us and made us march into the vault. Then they closed the door behind us and we were in the vault for a short time. And then one of the tellers turned on the alarm and turned on the air switch, and then the door was opened for us.

Q. Do you know who opened the door? A. I didn't know at the time. I know now. His name—

Q. No. Now, sir, you said that while you were standing at Mr. Kennedy's cage you heard a voice saying, "Get over against the wall?" A. Yes.

Q. Now, where did that voice come from, sir, as you were standing facing the cage? A. It was on my left-hand side, between me and the door.

Q. Now, sir, when you heard that voice, what did you do? A. I turned around to see where it was coming from and what the nature of it was.

Q. And when you turned around in the direction of the voice, tell us what you observed? A. I was looking into the muzzle of a gun, and the fellow was standing there holding it pointed up at my head.

Q. Now, will you describe as best you can the man who was holding that gun on you at that time? A. He was a little taller than I am, so I am not very good at guessing heights, but I would say—

Q. How was he dressed? A. I would say he was somewhere around 6 feet tall, and all I noticed was his shirt; he had on a white shirt with short sleeves.

Q. After you went over toward the wall, I think you said, you had an occasion to look toward the cages or the vault in the bank? A. Yes, I did.

Q. Would that have been to the left of the position that you assumed facing the wall? A. Yes.

Q. And by the way, while you were facing the

wall, sir, did you receive some instructions as to your hands? A. At first we were told to keep our hands raised.

Q. And did you do that? A. Yes, we did—I did.

Q. And can you tell us how long you kept your hands in a raised position? A. Well, I don't know how long, but it seemed like an awful long time. But I don't imagine it was too long; it was a matter of minutes.

Q. Did there come a time when you received instructions to lower your hands? A. Yes.

Q. Will you tell us what the instructions were at that time? A. We were all told that we could put our hands down, but for the cop to keep his hands raised.

Q. Now, sir, you testified that there was a man at the door? A. Yes.

Q. While you were standing facing the wall, did you hear instructions coming from the area near the front door of the bank? A. Well, now and then they were talking back and forth.

Q. I mean with reference to customers coming into the place in the course of this incident? A. Well, as a customer would come in, he would tell them to get over against the wall.

Q. All right, sir. Now, did you have occasion while you were in that position to turn in the direction of the door?

Q. Did you at any time observe the man who was standing near the door? A. No.

Mr. Louison: I object.

The Court: I will allow it.

The Witness: Just once or twice while he was walking behind whoever he was bringing over to the wall, I got a glimpse of the person from the corner of my eye.

Q. Out of the corner of your eye? A. Yes.

Q. Now, can you tell us how the man standing at the door was dressed that morning whom you saw out of the corner of your eye? A. Well, he had on a blue suit, and

he had on a soft hat, and he had on glasses, dark glasses.

Q. Did you observe anything else about him, sir?

A. Well, he was taller than I was; at least, it seemed so.

Q. And did you observe his hands? A. No, I didn't.

Q. Can you tell us whether or not you observed a gun?

A. Yes, I did.

Q. You told us about a man who was standing at the door, and you told us about the man whom you first saw?

A. Yes.

Q. Did you on that morning ever see a third man whom you say was present there that morning? A. Just once I got a glimpse of another man, and that was when they were emptying the cage and emptying the money into the paper bag.

Q. Now, sir, I forgot to ask you as to the man whom you first met, who had a gun on you when you turned around, what was his complexion? A. Well, he was colored.

Q. And the man in the blue suit, sir? A. He was colored, also.

Q. Now, sir, do you see in this court room today any person whom you saw, other than bank employees or customers, any person whom you saw in the bank on the morning of July 18, 1957?

Mr. Louison: I object.

The Court: It is a perfectly proper question. Go ahead.

The Witness: Yes, I do.

Q. Will you step down, please, sir? [Witness complied.]

Q. Will you please point out to the Court and Jury any person whom you say you saw in the bank on the morning of July 18, 1957, other than a customer or employee of the Canton branch of the Norfolk County Trust Company?

Mr. O'Donnell: I object.

The Court: It is a perfectly proper question. The witness obviously has a right to answer it, and I am allowing it.

Mr. O'Donnell: May I put my—?

The Court: Don't misunderstand me, Mr. Foreman and ladies and gentlemen of the Jury; when I allow that question, I allow it because I rule that it is a perfectly proper question. The weight of it is for you. I would like to know how in the name of God any person could identify anyone unless they pointed them out.

Mr. O'Donnell: Your Honor, may I put my objection on the record at the bench?

The Court: Certainly, you have a right to. I don't know how any objection could be made to it. The difficulty, what I would like to have the witness do, Mr. Koen, is this, if your objection is to the fact they were employees or customers—

Mr. O'Donnell: No, my objection is that this witness has not established an observation that would allow him to make a legitimate identification.

The Court: That is a question—

Mr. O'Donnell: And that it is merely speculation and guesswork.

The Court: That is a question—it is simply and absolutely one that has no merit of any kind. It is a question of fact for the Jury, or a jury never could convict anybody. You may take it on cross-examination.

Here is a man that goes into that bank on business and talks about someone putting a gun up to him, and looks around and says he sees him and sees somebody else, and Mr. Koen, without asking him the direct question who he saw, says, "Can you point them out?" When I allow it, don't have any misunderstanding, I don't need any rule of evidence on that; it is plain horse sense. Go ahead and point anybody out, Mr. Witness.

Q. Will you point out the man for the Court and Jury, please, whom you say you saw there that morning? A. [Ap-

proaching the witnesses and examining them.] This [indicating] looks like the man that had the gun and that—

Mr. Koen: Will you stand up, please?

Mr. O'Donnell: Object.

Mr. Koen: Will you—?

[Defendant Lester rises.]

Mr. Koen: May the record reflect that the witness had indicated the Defendant Donald Lester.

The Court: Well, the question is whether or not he is the man. Is he the man?

The Witness: Do I have to answer that?

Q. The Court has asked the question, sir.

The Court: Does anyone object to that question?

Mr. Koen: I don't object to the question.

Mr. O'Donnell: I object to it.

Mr. Koen: Then I will ask the question, sir.

Q. Is that the man, sir?

The Court: Giving your best memory.

The Witness: He looks like the man.

Q. Now, sir, do you see anybody else in this court room whom you saw in the Canton branch, outside of employees of the bank, officials, that you saw in the bank on that morning? A. I can't be sure.

Q. All right, sir, you can't be sure. Is there anybody in this court room who resembles the man whom you saw in the bank on that morning? A. Yes.

Q. Will you point him out, please? A. The man on the left.

Q. Will you stand up, please, sir?

[Defendant Arnold Campbell rises.]

Mr. O'Donnell: Object.

Mr. Koen: May the record reflect that the witness has pointed to the Defendant Arnold Campbell.

Mr. O'Donnell: As resembling.

The Court: That is right.

Mr. Koen: That was the question.

Q. All right, sir, take the stand. [Witness returned to the witness stand.]

The Court: Now, with reference to the man whom you say had the gun and told you to go over to the wall when you say you turned around and looked at him, can you identify that man?

Q. Who is he? Do you see him in the court room?

Mr. O'Donnell: Object.

The Court: Do you?

The Witness: Yes.

The Court: Well, answer the question. Who is he?

The Witness: The first man.

Defendant Lester: This is ridiculous.

The Court: The Jury may disregard entirely that remark. There is nothing ridiculous about any trial of this case. If you make another outcry—

Mr. O'Donnell: The defendant apologizes, your Honor.

The Court: I won't accept his apology. You are all right, Mr. O'Donnell. He knows what he has to do. Don't make an outcry like that again or I will take summary action. You know better.

There will be no inference in connection with that, no inference against this witness, against any defendant who does not testify, but the only way to receive that testimony is right on this witness stand. So you disregard it as favorable to this witness, and I am warning the defendant not to do that again.

Mr. Koen: I have no further questions.

The Court: I have asked a question. Who did you identify? The same man, was it?

Q. [By Mr. Koen] By "the first man," do you mean the first man you saw in the bank? A. Yes.

The Court: And who was that?

The Witness: That was the man sitting in the middle.

Mr. Koen: May the record show that the man sitting in the middle is Donald Lester?

The Court: That is right.

Mr. Koen: I have no further questions.

Cross Examination by Mr. O'Donnell

XQ. How do you pronounce your last name, Mr. Witness? [The witness pronounces his name.]

XQ. May I have it once again? A. [The witness pronounces his name.]

XQ. Now, as a result of being in this court room I heard your testimony that you got some glances out of the corner of your eye at these different people that were in the bank; that is so, isn't it? A. Yes, it is.

XQ. And when you glanced at these people sir, whether or not you had seen them before that day?

The Court: Do you understand the question?

The Witness: No, I don't.

XQ. Whether or not the people you say were in this bank, the negro people, you had seen before that day? A. Yes, what about them?

XQ. Well, had you seen them prior to July 18th, Mr. Witness? A. No, I hadn't.

XQ. Now, in so far as testifying about getting a glance out of the corner of your eye, when you came in the court room this morning do you recall seeing a colored fellow pass you? A. When I came in the court room this morning?

XQ. Yes. A. I don't recall, because I wasn't paying any attention.

XQ. Well, did you see the previous witness that was on the stand this morning? A. Yes, I did.

XQ. So that you observed him walk out of this court room. Does that help your memory now? A. Well, I saw him on the stand, but I didn't pay any attention to where he went when he left the stand.

XQ. And you saw him get off the stand? A. Yes.

XQ. And, of course you got a glance at him, right?
A. Yes.

XQ. Could you agree with me that taking a look at that previous witness you would go along and say that he resembled the people that were in the bank there that morning?

Mr. Koen: Object.

The Court: I will exclude it.

Mr. O'Donnell: Objection.

The Court: And I will exclude any inference that flows from that. You saw the witness.

XQ. Now, you say that you observed a man in there with a blue suit on? A. Yes.

XQ. And some dark glasses? A. Yes.

XQ. Do you remember what kind of a shirt, if any, the man in the blue suit was wearing? A. No, because I saw him from the side. I didn't see the front of him. I didn't see his shirt.

XQ. When you say you saw him from the side, what side did you see him from? A. Oh, it would be his right side, or my left side.

XQ. And at the time you made that observation, directing you to Government's Exhibit No. 5, this is a floor plan of the bank in Canton known as the Norfolk County Trust, and the pointer now is at the entrance to the bank, and this [indicating] would be the first teller's cage, second, third, and fourth. This area over here would be, if you were a customer, where Mr. Leonard sits, over here the public space, down here the vault—do you follow the plan? A. Yes.

XQ. So that what time was it when you went to that bank? A. What time in the morning?

XQ. Right. A. It was before 10 o'clock in the morning.

XQ. How do you fix the time, your best estimate of the time? A. It was about twenty of ten, or somewhere around that.

XQ. So that when I ask you the question, if you don't have it exact, feel free to give your best estimate; okay? A. Yes.

XQ. Now, you came in and stopped at Teller No. 1? A. No.

XQ. Teller No. 2? A. No.

XQ. Teller No. 3? A. No, I didn't stop at the teller's.

XQ. You went to one of the customers' —? A. I went over to one of the desks on the side.

XQ. This here [indicating] would be the huge window that floods—or allows light to come in?

Mr. Koen: Object.

The Court: Let me have the question.

Mr. O'Donnell: Well, strike it; I will withdraw it.

The Court: All right, forget about it; no inference is to be drawn from it if it isn't answered.

XQ. Now, Mr. Witness, the public space, what the pointer is covering now, would be the area where the window that faces out to the parking lot is; is that familiar? A. Yes.

XQ. There are a couple of desks here [indicating]? A. Yes.

XQ. What desk were you working at? A. The desk on the left.

XQ. And that would be the desk closest to the vault? A. Yes.

XQ. And the desk that is furthest away from the entrance? A. Yes.

XQ. So that was it at that time you were directed to put your hands up, while you were working there? A. No.

XQ. So when you completed your work there, whether or not you approached the teller's window? A. I did approach the teller's window.

XQ. Will you kindly tell me which one, Mr. Witness?
A. No. 2.

XQ. You mean over here [indicating]? A. Yes.

XQ. And that was Mr. Kennedy? A. No, it was not.

XQ. Will you kindly tell me the name of the teller?

A. I don't recollect who the teller was; there was somebody standing in front of me.

XQ. Another customer standing in front of you? A. Yes, there was.

[1468] XQ. But you can't remember what teller was in this booth? A. No, because I wasn't paying any attention to who was in there.

XQ. Was it while you were standing here, sir [indicating], that you were asked to put up your hands? A. No.

XQ. All right, would you tell me when it occurred, as of the time you were standing here behind another customer [indicating]?

Mr. Koen: Object.

The Court: Let's have the question.

[The question is read.]

Mr. Koen: It isn't too clear to me.

XQ. Do you understand the questions as we have been going along, Mr. Witness?

The Court: The question is, did he understand this question.

Mr. O'Donnell: I withdraw the question, just to get on.

The Court: You can have it if he can answer it.

Mr. O'Donnell: Well, I will withdraw it. Mr. Koen says he doesn't understand it.

The Court: Do you want to rephrase it?

Mr. O'Donnell: Yes, your Honor.

The Court: All right. I am not compelling you, now.

XQ. It wasn't while you were standing here at Teller

No. 2, after you had left the customer's table, when you were told to put your hands up? A. No.

XQ. Now, directing your attention to that moment when you were standing in front of Teller No. 2, what next occurred? A. I went to Teller No. 1.

XQ. All right, then, what occurred? A. It was while I was standing and waiting for Mr. Kennedy to return to wait on me that it did happen.

XQ. Mr. Kennedy wasn't in the booth at that time? A. He was standing at his window.

XQ. Well, he wasn't in the booth, was he? A. I don't know, because I was looking at my slips; I wasn't looking into the booth.

XQ. And while you were standing here [indicating], were any other customers at that window? A. No.

XQ. And it was while you were standing here that you were told to put your hands up and go over to the wall? A. Yes.

XQ. And at that moment, sir, whether or not you made a view—oh, you testified you looked at the person that so directed you, right? A. Yes.

The Court: He testified he looked around and saw a man with a gun in his hand. Didn't you testify to that?

XQ. That is your testimony, that you saw a man with a gun in his hand? A. At that time, yes.

XQ. And you received some instructions from the man with the gun in his hand to go over here [indicating] and hold your hands up in the air? A. Yes, I did.

XQ. And you followed the instructions? A. I did.

XQ. When you were standing at this teller's booth [indicating], No. 1, and received those instructions, you turned your head, did you, sir? A. Yes.

XQ. To look at the person giving you the instructions, right? A. Yes.

XQ. And where would you place the person that gave you the instructions in relation to the entrance of the bank? A. He was standing almost beside me.

XQ. Over here [indicating]? A. Yes.

The Court: You say he was standing almost beside you?

The Witness: Yes.

XQ. And as a result of the instructions, you took a look at this person, and you said you looked at the muzzle of a gun, right? A. That is right; that was the first thing I saw, was the gun.

XQ. And you went over here and held your hands in the air? A. Yes.

XQ. Now, the person you looked at, whether or not he had dark glasses on? A. He didn't have any glasses on.

XQ. Whether or not he had a hat on? A. He didn't have a hat on.

XQ. Whether or not he had a blue suit on? A. He didn't have a blue suit on.

XQ. Whether or not he had a mask on? A. At that time he didn't have a mask on.

XQ. What do you mean, at that time he didn't have a mask on? A. Well, the other fellow that I saw from the side had a mask pulled up over his face.

XQ. Did you see this fellow later with a mask on, that is my question? A. No.

XQ. So that when you say at that time he didn't have a mask on, the only time you remember is that when you received instructions he didn't have a mask on?

The Court: You asked him whether or not when he turned he had a mask on, and he said he didn't at that time.

Mr. O'Donnell: That is right.

XQ. Sir, he did not at that time have a mask on, that is your testimony, right? A. That is right.

XQ. Whether or not as to your best knowledge you ever saw the man you have been telling us about with a mask on? A. What was that question?

XQ. Whether or not to your best knowledge you ever saw the man you have been telling us about, standing next to you right here [indicating] with a gun, when you looked at the gun, whether or not you ever saw that man with a mask on?

The Court: When?

Mr. O'Donnell: I put him right here [indicating], standing next to him.

The Court: He has put him right aside of him, and he said he had no mask on, and he turned and looked into his face. And he said he didn't have a mask on at that time. That is the testimony.

Mr. O'Donnell: I agree with that testimony.

The Court: Then if you agree with it, the last question should not be asked.

XQ. So that, sir, you said at that time he didn't have a mask on, right?

The Court: It has already been answered.

Mr. O'Donnell: No, he hasn't, your Honor.

The Court: When you looked around and saw a man with a gun in his hand pointing at your head, and he gave you directions, and you looked into his face, did the man have a mask on?

The Witness: No, he didn't.

XQ. Did you later on see that man with a mask on?

A. No.

XQ. Now, I suppose you know Mr. Yates in that bank?

A. I probably know him if I see him. I don't know him by name.

XQ. Well, you are a customer of the bank, you know Mr. Kennedy? A. Well, I usually go to one teller all the

time. I haven't had much to do with anyone else in the bank.

XQ. Well, you know Mr. Leonard, the manager? A. Yes.

XQ. And Mr. Yates is a tall fellow with blond hair. This isn't—or is it, is this the first testimony you have given in this case? A. Yes.

XQ. Did you testify any place else in regard to this matter, like the Grand Jury? A. Yes.

XQ. And when you go into these places, have you met these different people that work at the bank. A. Well, I know them from sight, but I don't remember them from name.

XQ. So I have tried to describe Mr. Yates to you? A. Yes.

XQ. Does that help your memory at all about Mr. Yates? A. I still can't place him.

XQ. You know Mr. Leonard? A. Yes.

XQ. You know Mr. Kennedy? A. Yes.

XQ. Can you think of any other employee of the bank that is a cashier and assists at being assistant manager?

A. I don't know them by name. I know the name if I see it.

XQ. The name is familiar to you? A. Yes.

XQ. Whether or not you recall a man working over in here [indicating], while you were at Teller No. 1, just prior to your being told to stick your hands up? A. No, I don't know who was over there.

XQ. But your best memory is that this person that came next to you was unmasked and did not have a blue suit on?

A. No, he didn't.

XQ. At that time, did you notice another person, a colored person, in the bank, over at this gate [indicating]?

A. No.

The Court: Does that mean, Mr. Witness, from your memory there was no one at that gate?

The Witness: No, it does not, because I was too involved in my own situation to notice whether anybody was there or not.

XQ. Now, whether or not, Mr. Witness, you can recall a colored man in this area [indicating] jumping over a partition? A. I just told him I was too absorbed.

XQ. I am asking you the questions, sir. Either you recall it or you don't, and if you don't, obviously you just answer "I don't." A. I don't.

XQ. All right. Now, you of course have told us how you were involved in your own situation. When you turned to look at this man that gave you the instructions, did you turn your head over to him and take a look at him? A. Yes.

XQ. And then upon receiving instructions you walked over here [indicating], right? A. Yes.

XQ. Were there other people over in this public space area? A. Yes.

XQ. And how many would you estimate? A. At that time?

XQ. Yes. A. About five or six.

XQ. And you remember Officer Fitzgerald coming in? A. Yes.

XQ. And of course, did you look out of the corner of your eye when he arrived, or something like that? A. Yes.

XQ. And of course, he also received the same instructions as you did, adding, "Be a good cop or you will get killed," or something like that? A. Yes.

XQ. And you are satisfied when you looked out of the corner of your eye that the same man gave him the instructions that you received?

The Court: Pardon me. He said he turned around.

Mr. Koen: Object.

The Court: I don't want this evidence—the weight is for the Jury, he said the man stood aside of him. And when he said whatever it was, calling his attention that

it was a stickup, that he turned and looked into the gun and looked into the man's face.

Mr. O'Donnell: Right.

The Court: Then he later on said he took it sideways; isn't that right, Mr. Witness?

The Witness: Yes.

XQ. And Mr. Witness, he was lined up the same way you were? A. Who was?

XQ. Fitzgerald, the man you said was a cop. A. He was over a little way from me.

XQ. And when you caught out of the corner of your eye Fitzgerald, and heard the instructions given to him, it was the same fellow that put you over there? A. No, it wasn't.

XQ. So that you want to correct me on that if I should say it was the same fellow? A. Yes.

The Court: That may be disregarded. It isn't up to him to correct you. You are counsel cross-examining. He said it wasn't, and the rest may be disregarded by the Jury.

XQ. Whether or not, sir, the man that asked Fitzgerald to go over there was wearing a blue suit?

The Court: If you know.

The Witness: Yes, he was.

XQ. And is that the man you say you observed some dark glasses on? A. Yes.

XQ. And where—when you were standing holding your arms up in the air, where were you standing? Right near the corner in this area, sir [indicating]? A. Yes.

XQ. The public space up near the front of the bank near the customer's desk? A. Yes.

XQ. So that how much time elapsed from the point where you were at Teller Window No. 1, as you say, with your deposit slips—making certain they were correct, right? A. Yes.

XQ. And the time when you were standing up over here

[indicating] with your hands up after receiving the instructions? A. A matter of two minutes.

XQ. A matter of two minutes? A. Or thereabouts. I am not expert on time. It seemed like a long time to me.

XQ. It was a long time standing over here [indicating]? A. Yes.

XQ. And, of course, it is fair to say that under those circumstances that you related, when you received the instructions, that you carried them out, you did what you were told? A. Yes.

XQ. And from the time you received the instructions until you reached the point where you stood, of course you would say that was less than two minutes? A. I couldn't say how long it was.

XQ. And there is no doubt in your mind that you took yourself right over there? A. Yes.

XQ. The minute you saw the muzzle of this gun, right? A. Yes.

XQ. And that you know exactly what was occurring, right? A. No.

XQ. When you turned around and saw the muzzle of this gun? A. When I turned around and saw the muzzle of the gun, I didn't know what was occurring. It didn't strike me as a—

XQ. All right, you were told to put your hands up? A. Yes.

XQ. Then you turned your entire body around and went over here by the wall [indicating]? A. Yes.

XQ. And you then, in going over there, had to walk beyond the man that gave you the instructions, right? A. Yes.

XQ. As a matter of fact, when you received the instructions and you started back toward the wall, it was only a step or so when he was behind you; that is so, isn't it? A. I don't know where he went once I turned my back.

XQ. So when you were here and received the instructions, the minute you started to carry out his instructions, you turned your back on him; is that it? A. Yes.

XQ. So that when you placed the time of getting over here [indicating], and so forth, and got a look at this man that you described, that look was what? A matter of seconds? A. Yes.

XQ. So the other glance you got out of the corner of your eye, on the Officer Fitzgerald instance, at that time were your hands up or had you been instructed to put them down? A. No, I still had my hands up.

XQ. That was just out of the corner of your eye, like that [illustrating]? A. No, I had my head turned at an angle.

XQ. You didn't turn your body and take a full look, turning around like that [illustrating]?

The Court: You don't look with your body, you look with your head and eyes. Did you turn your head?

The Witness: Yes.

XQ. Did you have occasion to turn yourself around, sir? A. No.

The Court: Did you have occasion to turn your head around?

The Witness: Slightly.

Mr. O'Donnell: I would like to make an offer of proof that you can't turn your head all the way around.

The Court: You can turn it around enough to look. I can sit here now and turn around to the right and turn around to the left; that is what the witness means.

XQ. Now, Mr. Witness, it was a side glance at Officer Fitzgerald and the man in the blue suit? A. Yes.

XQ. You were up facing the wall, and you say your hands were still up like that [illustrating]? A. I didn't have them up high like you have them.

XQ. Something like this [illustrating]? A. Yes.

XQ. And while your hands are in that position, did you turn to your left or turn to your right? A. To my left.

XQ. So you got your arm here [illustrating]? A. Well, you have got your arm there and you can see me, can't you?

XQ. Well, Mr. Witness, was the person you were looking at behind you or on your side like you are from me? A. On my side.

XQ. So that you were able to look out of the corner of your eye that way [illustrating], right? A. Yes.

XQ. And that look encompassed Officer Fitzgerald, right? A. Yes.

XQ. And the man in the blue suit? A. Yes.

XQ. Would you estimate the time you had to take that glance? A. No, I wouldn't estimate it.

XQ. Very short, right? A. Yes.

XQ. Now, do you recall that on direct examination you were asked to come down here, Mr. Witness, stand here [indicating] and look at the defendants? A. Yes.

Mr. Koen: I pray your Honor's judgment. That isn't what I asked him to do.

The Court: He never asked him to do that. He asked him to see if there was anyone in the room he could identify when he walked down there.

Mr. O'Donnell: I will withdraw the question.

The Court: That was the question, and that is the answer, and let's keep out what you—you know that was so, too, Mr. O'Donnell, so you go ahead and ask your questions.

XQ. At some time, Mr. Witness, you were standing approximately here [indicating], right? A. Yes.

XQ. After you came down from the witness stand; is that so? A. Yes.

XQ. And Mr. Koen was standing over here [indicating]; that is so, isn't it? A. Yes.

XQ. And at one time you were asked a question by the Judge as to whether or not it was the man, is it the man—?

The Court: No, I asked him if he saw the man, the man that he saw, and he turned around after he was told to put his hands up, did he see the man's face, and he said yes. And I said, "Can you identify that man who told you to put your hands up," and he said, "Yes;" isn't that right, Mr. Witness?

The Witness: Yes.

XQ. Whether or not, while you were standing right here, approximately where I am, you looked to Mr. Koen and said, "Do I have to answer that in the affirmative"? A. Yes.

XQ. Because another question was put to you about does the man resemble, and you answered that—

Mr. Koen: My objection.

Mr. O'Donnell: I haven't even finished it. I will withdraw it.

XQ. Were you asked a question whether or not any one of these defendants resembled a person in the bank that day? A. Yes.

XQ. And on that, you didn't—when you were asked that question about resembling, you didn't put the question to Mr. Koen of "whether or not I have to answer that in the affirmative," did you, sir? A. No.

XQ. Now, if I were to ask you about Donald Lester, when you were looking at Donald Lester, and that is when you—

The Court: Take your hands down from your chin, Lester.

[Defendant Lester complied.]

The Court: Go ahead.

XQ. That is, when you were looking at him and you got the question, that is when you posed the proposition to Mr. Koen, "Do I have to answer that in the affirmative?"

Mr. Koen: My objection, for two reasons.

The Court: Well, will you come up and state them?

Mr. Koen: Yes, sir.

[Conference at the bench, at which the following was recorded:

Mr. Koen: Two things, Judge. First of all, the question contains characterization. Secondly, the question gives the impression that the question was asked by me rather than by the Court, to which this answer of Mr. Staula was given.

The Court: Well, I asked the last question.

Mr. O'Donnell: That is right, I brought that out on the record. It was all foundation before I reached this point.

The Court: I asked the last question. I would like to say, Mr. O'Donnell, while you are here, I wanted to amplify a situation that was before us yesterday, and it was a question as to the reefers that the witness Gibson—and I want you to know that this witness is here. I excluded the question because it carried the imputation of illegal acts on the part of the witness without laying a proper basis for asking the question, and that is why I excluded it; in addition to the fact that whatever reefers are, someone ought to be in a position to testify what they are if they know. I don't think it is common knowledge. People don't understand what reefers are. You and I do, and Mr. Koen and the others, I mean those that are in the habit of either prosecuting or defending persons charged with crime. It is something that I know. I know what they are.

I only know what they are because I know considerable about the law, and I had a little bit to do with it, some of my recommendations in connection with the adoption of the Marijuana Act.

That is why I want you to know that I excluded it and I am still not precluding you from the right to recall that witness under proper circumstances, and he is available to you at any time.

After all, he is here, and it is an illegal act, and it has got nothing to do with whatever may have occurred, but it might well affect the weight you should give a witness' testimony.

Naturally it affects the weight, and the credibility, if it is an illegal act. And if it is, there is a way to show it.

Mr. Koen: What is your ruling on my objection, Judge?

The Court: I am going to exclude the question.

Mr. O'Donnell: Objection.

The Court: All right.]

The Court: I will let you ask it in another way, Mr. O'Donnell. I have got to exclude it in that form because of the characterization.

Now, Mr. Foreman and ladies and gentlemen of the Jury, I want to re-emphasize, if I haven't done it already, and I am afraid I haven't on this particular incident. The defendant Lester gave expression to some words, and thoughts in the form of words. The only way that you can get testimony is on this witness stand. You can't get it any other way. No one can compel a defendant to take the witness stand, and it is a very, very efficacious rule, and I hope it will never be changed, because of the great amount of good that comes from that and because of the moral basis behind it. When a person is charged with the commission of a crime, it should be the obligation of the Government legally to establish it along avenues which are dedicated to principles of law.

So that whenever exclamations come of that nature, they certainly can be classified as intemperate and

as unwarranted. And of course, obviously, it came from one of these defendants, the Defendant Lester. No inference can be drawn, and I will have to tell you when I charge the Jury, if defendants do not take the witness stand. But if any defendant in this criminal case is desirous of giving testimony, the place to give it is right there on that witness stand.

So I am going to ask you—I have given this defendant an admonition, I have given him a warning, and I do not want to have that affect the other two defendants, and I do not want it to affect his rights. He is entitled, as a matter of plain, sound, legal reasoning, in conformity with all the standards that are near and dear to us, to remain silent. And he is entitled, through his counsel, to have the Government affirmatively satisfy you by a test that I will give you later, and I have refrained from doing it now because if I do, there might possibly be some objection made, and I am going to make it at the proper time when it will correlate with others. And that is why I have told you to keep your minds wide open.

Of course, I don't want you to draw any inference against the defendant; I want you to be sure of that, I don't want you to draw any inference of guilt, I mean by that, against the defendant because he said that; I don't want you to do that. I want to have this record crystal clear, so that you will know exactly how the Court feels. The Court talks this way only because it has been made necessary because of the intemperate comment made by this defendant.

All right, Mr. O'Donnell.

XQ. Now, is it in this part of the public space [indicating] that you were standing with your hands? A. Yes.

XQ. So that here [indicating] would be generally what we will refer to as the corner in front of the bank, right?

A. I wasn't right in the corner.

XQ. Can you tell me with the pointer? Show this jury where you were. [Witness complied.]

XQ. Now, that would be at the front of the bank, at the public space. This [indicating] would be a window. Are you familiar that there is a window there? A. Yes.

XQ. Now, may I have that once again, please? [Witness pointed on the chart.]

Mr. O'Donnell: May I have that red pencil, Mr. Clerk?

XQ. Now, Mr. Witness, would you put on this Government's Exhibit No. 5 a red mark, a cross? [Witness complied.]

XQ. Would you put a dot in that mark you have made, as to where you were standing? [Witness complied.]

XQ. And would you just jot your name in there? [Witness complied.]

XQ. Now, sir, which wall were you facing? This one, or that one [indicating]? A. That one [indicating].

XQ. The one against the parking space? A. Yes.

XQ. You were facing this wall [indicating]? A. Yes.

XQ. Whether or not there was any customer on your right? A. No.

XQ. Whether or not you had them on your left? A. Not close.

XQ. They were on your left, however? A. Not exactly, not directly on my left. In other words, they might have been on my left side, maybe forward a little or in back of me a little.

XQ. So that there were some customers on your left, not directly on your left, okay? A. Yes.

XQ. That would place them in closer to the wall and back closer this way [indicating]? A. Yes.

XQ. Now, sir, while you were in that position with your hands up, there came a time when your hands went down; is that your testimony? A. Yes.

XQ. Were you moved from that position prior to taking the walk down and going in the vault? A. No.

XQ. And while in that position, for how long were you in that position prior to Officer Fitzgerald coming into the bank? A. Oh, it would just be a guess, probably 10 minutes.

XQ. And you assumed that position for 10 minutes, and can you now tell me where Officer Fitzgerald stood?

A. Yes, in here somewhere [indicating].

XQ. He was standing up in here [indicating]? A. Yes.

The Court: No; he said up in there somewhere; isn't that what you said?

The Witness: Yes, he was in my vicinity.

XQ. Is my pointer on the spot you indicated, Mr. Witness? A. It is somewhere around that. I don't know exactly the exact spot.

XQ. I wouldn't want to have it any place you didn't want me to have it.

The Court: The witness said somewhere in that spot; isn't that what you said?

The Witness: Yes.

XQ. That is near the customer's desk, anyway? A. Yes.

XQ. Whether or not while you were in the position you indicated here on the blackboard the person that you say gave you instructions here—? A. Say that again?

XQ. The person you say gave you instructions to hold up your hands and get over here, and so forth. A. What about it?

XQ. Did he ever walk in front of you? A. No.

XQ. Now, as to the man in the blue suit, did he ever walk in front of you? A. He walked to the side of me.

XQ. The question is, did he ever walk in front of you, Mr. Witness? A. No.

XQ. So that when you say he walked to the side of you, that would place him where? A. From the position that

he took by the door, he was walking over with the people in this direction [indicating].

XQ. Now, whether or not you told us about walking with anyone besides or in addition to Officer Fitzgerald? A. Well, he walked other people over, too.

XQ. And you know that as a result of other people telling you that, Mr. Witness? A. No.

XQ. And now do you want to add to the fact that you observed him out of the corner of your eye when he was walking other people over? A. Yes.

XQ. Now, in addition to Officer Fitzgerald, could you tell us the number of other people he walked over? A. I don't know. I didn't count them.

XQ. But you are satisfied, while you were standing here, before Officer Fitzgerald came over, you had some customers behind you and to your left but not directly to your left? A. Yes.

XQ. And that as time went on there were other customers that assembled there in addition to Officer Fitzgerald? A. Yes.

XQ. And when you took this glance at the man in the blue suit, it was from the side? A. Yes.

XQ. You never had occasion to turn around and face the man in the blue suit in this area here [indicating], and I am pointing to the entrance near the night deposit vault? A. Yes.

XQ. You had occasion to turn around and take a view while he was there? A. I saw him. I didn't turn my body around, but the position I was in I could see him standing there once in a while.

XQ. Are you familiar with that night deposit vault? A. I am familiar with the door.

XQ. Are you familiar, sir, with the fact there is some vault there, for night deposits or something? A. No.

XQ. Near the entrance or door? A. No, I never noticed. never noticed.

XQ. But you are familiar with the area there in front of Teller No. 1; that is in through here [indicating]? A. Yes.

XQ. Well, you are generally familiar with the whole bank, aren't you?

Mr. Koen: Object.

The Court: It is excluded.

XQ. Now, Mr. Witness, you say that while the man in the blue suit was in this area [indicating]? A. Yes.

XQ. And while you were standing facing this wall—? A. Yes.

XQ. That you had occasion to turn your head? A. No, I didn't say that.

XQ. But you did say, however, that you observed him while he was standing here [indicating]? A. Yes.

XQ. And how did you observe him while he was standing here [indicating]? A. Well, he wasn't standing where you are pointing.

XQ. My question, sir, is whether or not you observed—I have already gone over the fact where you have told me you observed him when he was directly to your left. A. Yes.

The Court: And you have also gone over another thing; he told you he observed him when he was having men go in that direction.

Mr. O'Donnell: I brought that out; he said he escorted other customers in addition to Officer Fitzgerald.

The Court: That is right, he said he observed him when he was taking others over there.

Mr. O'Donnell: That is right, I brought that out.

The Court: You brought it out? He is the one that testified to it. If he didn't, you may interrogate him about it.

XQ. Mr. Witness, my question now, is, Did you, while you were standing here with your hands up facing the wall, that is, against the parknig lot—and you have testified that you didn't move from that position until you took the march down to the vault—whether or not you observed the man in the blue suit at the door here [indicating], near the entrance, where my pointer is fixed?

A. No.

XQ. So that, Mr. Witness, in conclusion, can you tell me whether or not you can give me the height of the man in the blue suit? A. He was taller than I am. I would say he was in the vicinity of 6 feet or thereabouts. He might have been 5, 11; I don't know.

XQ. And whether or not you can give me the height of the man that instructed you to hold up your hands?

A. He was taller than I am. I don't know how tall he was.

XQ. Whether or not, sir, you can tell me if prior to taking the witness stand you were shown any pictures?

A. Yes.

XQ. When was the first time you were shown any pictures? A. At the gas station.

XQ. And where was that gas station located? A. It is in Boston.

XQ. And when you went to that gas station, whether or not you had an opportunity to observe a colored fellow working there? A. Yes.

XQ. And was he pointed out to you in the course of his duties there at the gas station? A. From a distance.

XQ. Well, was he pointed out to you, that is my question.

A. Yes.

XQ. And at that time, whether or not an FBI Agent was present with you? A. No.

XQ. You had some Boston police officer—

Mr. Koen: I pray your Honor's judgment.

The Court: Let me have the question.

The Court: I think you should ask him who was with him.

Mr. O'Donnell: That is what I am asking him.

The Court: No, you didn't; you are asking him whether he had a Boston police officer—if he did, he may say so.

XQ. Did you, Mr. Witness? A. Yes.

XQ. From Station 10? A. I don't know.

XQ. Do you remember his name? A. No.

XQ. And about what time of the year was that that you pulled in in a car into a gas station?

Mr. Koen: Wait a minute, please that is not—I object.

The Court: Well, I think he can fix the date he went to the station. You don't object to that?

Mr. Koen: No, I don't, but that is not the only basis of my objection.

The Court: You may reframe the question.

XQ. Can you fix the time you went into this gas station?

A. The time of day?

The Court: No. When with reference to the 18th of July was it?

Mr. Koen: My objection to the question, and I would like to be heard.

The Court: Well, you have a right to be heard up here.

[Conference at the bench, at which the following was recorded:

Mr. Koen: My objection is this, the witness testified that he was taken to a gas station, but he was some distance away from it. Mr. O'Donnell's question was the time he went into the gas station. That is positively not the way the testimony went in, and I object to it on that basis.

Mr. O'Donnell: What is your legal objection?

Mr. Koen: That is my objection. It is up to the Judge to say whether it is sound or not.

The Court: Will you reframe it and find out?

Mr. O'Donnell: The whole thing, sir? Did you want the identity he has made?

Mr. Hubley: You are just assuming something the witness didn't say. That is the objection.

The Court: Come over here, Mr. Witness, and we will find out.

Mr. O'Donnell: I would like to question him there.

The Court: All right, go ahead.]

XQ. Mr. Witness, is it so that you told me, in answer to my question, that you were then viewing some pictures, that you viewed some at a time you went to a gas station? A. Yes.

XQ. That is the way you answered me in reference to viewing the pictures?

The Court: I have some other matters in connection with another case I have here, and I have been notified by the bailiff that the lawyers are in my lobby waiting to see me, and so I will take a recess now until 12:00 o'clock.

[Recess.]

The Court: I want to say to counsel I had a very pressing civil matter in one of the cases that I am handling, and I had to give it some attentoin. I have done pretty well avoiding complications up to the present time.

XQ. Now, Mr. Witness, you have told us about the man that instructed you to put up your hands, and then another time you testified as to the man in the blue suit, right? A. Yes.

XQ. Now, you have talked about seeing some other people in the bank, or a person in the bank other than employees or customers? A. Yes.

XQ. Now, where would you place that other person you say you saw other than the employees or customers? A. At the vault.

XQ. Would you point it out? A. Yes [indicating].

XQ. Now, the man that you have pointed out here as

resembling a person you saw in the bank other than the employees or customers, where would you fix the position that you saw that person? A. The man that was walking back and forth from the door.

XQ. And that was the man in the blue suit? A. Yes.

XQ. And, in this court room, as to that man, you say as resembling him you indicated this defendant here [indicating]? A. Yes.

XQ. Arnold Campbell? A. Yes.

XQ. Now, sir, at the time you were shown the photos at the gas station, you drove over there in an automobile? A. Yes.

XQ. And you viewed someone working in that gas station? A. Yes.

XQ. And whether or not on that occasion you indicated whether or not you felt the person you viewed at the gas station resembled anyone in the bank on that occasion of July 18, 1957? A. Yes.

XQ. And whether or not, sir, you could tell me who was with you? A. There were two police officers and two of the bank tellers.

XQ. Well, can you remember their names? A. I know Mr. Kennedy. And the others, I don't know the names.

XQ. Two of the bank tellers. Were they male? A. One was a female.

XQ. Do you know the name of the female? A. No. There was another person there, too. I think it was—well, I don't know whether he was a teller or not.

XQ. What time of day was that that you were in the bank? A. It was in the morning.

XQ. Excuse me, that you were at the gas station? A. Some time in the afternoon.

XQ. And what month in the year 1957? A. The month of July.

XQ. And, of course, it is so that you were shown pic-

tures on that occasion while you were sitting in the car?
A. Yes.

XQ. And the picture or pictures you were shown, you were shown the picture of the individual colored fellow that was working in the gas station; that is so, isn't it?
A. Yes.

XQ. So that before you came into this court room, Mr. Witness, you had been shown the pictures? A. Yes.

XQ. Including the defendants that are here in the court room? A. Yes.

XQ. Now, in reference to your testimony from this floor of the court room, and referring to the expression you used, "Do I have to answer it in the affirmative"—?

Mr. Koen: My objection.

The Court: Would you read the question, please?

[The question is read.]

XQ. Does that bring you back—?

Mr. Koen: I object.

The Court: Will counsel come up, please?

[Conference at the bench, at which the following was recorded:

The Court: From my memory of the evidence, as the basis on which Mr. O'Donnell predicated this question, as the witness stood down there looking at the man you asked him the question—

Mr. Koen: No, you asked him.

The Court: No, you asked him. He said, "Do I have to answer it?"

Mr. Koen: That is not what Mr. O'Donnell says in his question.

Mr. O'Donnell: That question was purely preliminary, and he had already testified here on the cross-examination; he confirmed the fact that he said, "Do I have to answer in the affirmative?"

The Court: Well, don't use the word "affirmative."

Mr. O'Donnell: I didn't use the word.

Mr. Koen: You said, "Do I have to answer it in the affirmative?"

Mr. O'Donnell: He has already said that, "Do I have to answer that in the affirmative?"

Mr. Koen: Mr. Hunt, will you be good enough to go back to that situation, please?

Mr. Louison: This is cross-examination.

The Court: I want you to go back, if you can.

Mr. O'Donnell: When he said, "Do I have to answer that in the affirmative?"—

The Court: Well, let's find out.

Mr. Koen: That is not what he said, Judge.

The Court: All right, let's get it.

(The previous testimony was read, as follows:

"The Court: Well, the question is whether or not he is the man. Is he the man?

"The witness: Do I have to answer that?

"Q: The Court has asked the question, sir.

"The Court: Does anyone object to that question?

"Mr. Koen: I don't object to the question.

"Mr. O'Donnell: I object to it.

[1503] "Mr. Koen: Then I will ask the question, sir.

"Q: Is that the man, sir?

"The Court: Giving your best memory.

"The Witness: He looks like the man.")

The Court: Is that what you want?

Mr. Koen: Yes, sir. Then my objection to the question is that he incorporates in his question, and states "where you asked if you had to answer that question affirmatively." That carries with it the con-

notation that that is the exact words of the witness, which it was not.

The Court: Well, you can ask him, if he asks that question as it is.

Mr. O'Donnell: Now I will add this, as a result of what Mr. Hunt just read, that this witness said on direct examination—on the cross-examination I put to this witness a question, I asked him, "Did you say down here, in answer to a question from his Honor 'Do I have to answer that in the affirmative'?"—

The Court: But you objected.

Mr. O'Donnell: And he said "Yes."

The Court: No, there was an objection to that answer. And then when there was an objection [1504] to that answer, Mr. Koen said, "I will ask the question."

Mr. Louison: May I have that portion read by Mr. Hunt?

The Court: Read it again. What he just read now?

Mr. Louison: I understand that part.

Mr. O'Donnell: I understood.

Mr. Louison: Mr. Koen was the one who finally put the question, no question about that.

The Court: Yes, Mr. Koen said, "I will ask it."

Mr. Louison: But in the cross-examination the witness was asked—

The Court: The question I asked him, and his final answer, was "Can you identify the man?" and he said, "Yes." And he picked out this fellow.

Mr. Koen: My objection is that it is either one of two things that Mr. O'Donnell has in his question; it is either a direct quote, or if not, then it carries a characterization that is not warranted.

The Court: Why don't you read what he said? It is easy enough; the words are there.

Mr. Louison: And then we would like the portion from the cross-examination also read.

The Court: You mean what Mr. O'Donnell said?

Mr. Louison: Yes.

Mr. O'Donnell: Now, as a result of that direct testimony, I went into it on cross-examination.

The Court: All right, let's have a ruling on this one now. Read the question that Mr. Koen objects to.

Mr. O'Donnell: I would like to have read now the cross-examination, regarding the direct examination.

The Court: Oh, no, it will take too long. I am only going to rule on this question.

(The question is read.)

Mr. O'Donnell: Now, I contend that earlier on cross-examination with this witness he agreed that he used the expression, "Do I have to answer it in the affirmative?"

Mr. Louison: And I think that is so, your Honor.

The Court: When Mr. O'Donnell objected, I didn't order him to answer, so what is the difference?

Mr. O'Donnell: That isn't my issue at all. My issue is merely what the witness said. And when I asked him if he said, "Do I have to answer it in the affirmative?" on cross-examination, he said he did.

Mr. Koen: My objection is twofold. First of all, it contains a characterization. Secondly, it contains a statement which is not consistent with the record. The man did not say, in response—

Mr. O'Donnell: Then let's have the cross-examination read.

The Court: He said he looked at him

Mr. Koen: Why don't you let me answer the Court's question? First of all, it contains a characterization, and secondly, it purports to recite the witness' testimony from a position down there in answer to a question you originally asked, and which I restated, which is not consistent with the man's answer at that time.

Mr. O'Donnell: On cross-examination—

The Court: I will settle it.

Mr. O'Donnell: Objection.]

The Court: Mr. Foreman and ladies and gentlemen, I have had testimony read over to me, and so that there will be no misunderstanding, there has been an objection to the question. If the question was answered and was responsive to any question the Court asked, I would allow it. But the witness in answer to a question, "Is that the man?", the witness then gave the answer, "Do I have to answer that question?" Mr. Koen said he did not object. Mr. O'Donnell said he did object. Whereupon Mr. Koen said, "I will ask the question." So, obviously, in view of the fact that the Court received no answer to that question, the Court will order that stricken from the record, and nothing shall be drawn from that answer which would be detrimental to any of these defendants.

Now, Mr. Koen asked the question, and you may interrogate him with reference to that question. The Court will ask that that be stricken. It was not in response to any question of mine. It was a question asked by the witness, and I am not commenting on it, there was nothing wrong about it. Mr. O'Donnell objected to the answer being made, and when he did, Mr. Koen said, "Then I will ask it," and obviously the Court did not order the answer, and therefore I am ordering that statement stricken from the record and I am going to direct the Jury to disregard

every word of it in so far as it may or may not help the Government or help the defendant, as though it was never said.

And I am going to permit you, Mr. O'Donnell, in the light of the fact that the rest of the question was read and the answer to that, to cross-examine the witness with reference to his answer, and you know what it was.

Mr. Louison: Objection.

The Court: What is the objection to it? I am doing it in a fitting way. Go ahead, Mr. O'Donnell. I am permitting the question to be answered.

That question was not answered because Mr. O'Donnell objected to it, and he had a right to object to it. It was within the purview of his rights to object to the answer to that question, and when he did, Mr. Koen said, "I will ask the question," so he got the answer. That is all I want to have stricken out, is "Do I have to answer it?" Mr. Koen said, "I will ask it." I didn't order him to answer it. So it was a remark made by this witness with no background of proof one way or the other. And I want you to have the definite clear point of view that Mr. O'Donnell in his objection to that was perfectly proper, he had a right to do it. And then Mr. Koen asked the question and got the answer. The answer has been read to Mr. O'Donnell and to Mr. Koen, and that takes away any curiosity.

I thought in my mind I would exclude the question, because there are other objections to it, but I think I should do this in fairness to everybody, inasmuch as there was no answer given. If the witness had given an answer that was responsive, I would have allowed it to stand.

XQ. Now, Mr. Witness, as a result of stepping down from the witness stand, do you recall while you were standing here at one point you looked at Mr. Koen and said,

"Do I have to answer that question in the affirmative;" do you recall that?

The Court: I will exclude that, because that is not the story. That was in answer to the question I asked, and the record clearly indicates it.

XQ. Well, in view of the question his Honor asked when you were standing here, did you look over to Mr. Koen and say, "Do I have to answer that in the affirmative"?

The Court: I have ordered the Jury to disregard that, and I want you to carry out my instruction, Mr. O'Donnell, as though it was never said. There is another answer he made and you have a right to interrogate him, but I have ordered that stricken because it was a comment made by the witness. There was an objection by you, and if you hadn't objected there would have been an answer. You had a right to make the objection, and Mr. Koen then said, "I will ask the question," and he gave the answer, and you know what it is. And then later on I asked another question about identification, and I got the answer on that.

Mr. Louison: Objection.

The Court: Well, I did. I asked him if he could identify a certain defendant here that stood in front of him, when he turned his head around, with the gun pointing to his head, and he said "Yes." And I said, "Identify him if you can," and he did. And the weight of that is for the Jury.

Mr. O'Donnell: All right, your Honor.

XQ. Now, Mr. Witness, whether or not you ever told anyone prior to coming into this court room that you could make a positive identification; yes or no?

A. Yes.

XQ. And to whom did you tell that? A. The Grand Jury.

XQ. And that was upon a question of a Grand Juror?

The Court: No, please. I am not going to allow you—

Mr. O'Donnell: I will strike that.

The Court: I am not going to allow you to go into—

you know you can't go into any question that is asked in that Grand Jury. It is a very sacred and very secret hearing. Unless you tell me the constitutional rights of these defendants were violated. And you made that statement once, and I excluded it and had a voir dire examination and I found that it wasn't so.

XQ. Now, whether or not, Mr. Witness, you viewed any lineups as a result of your experience on July 18, 1957?

Mr. Koen: My objection.

The Court: I will permit that.

The Witness: No.

XQ. And could you tell me when you first related the story regarding your experiences on July 18, 1957, at the Canton bank? A. It was at the police headquarters in Canton.

XQ. And were any FBI agents present? A. Yes.

XQ. And can you remember the names? A. No, I don't know his name.

XQ. One took the interview from you, was it? A. No.

XQ. Two of them? A. There were at least two. I didn't know them.

XQ. And what was the time that that occurred? What time did you have that interview? A. You are asking me the day?

XQ. Your best estimate of the time, yes. If you can tell me the day, fine. A. I don't recall, but it was about noon-time.

XQ. Can you recall the date? A. No.

XQ. And can you recall the—fix the time in relation to July 18, 1957. A. It was after July 18, 1958.

XQ. How long after? A. I don't remember which day it was.

XQ. Well, how long after? A. It was more than a day after.

XQ. Well, was it three days after?

Mr. Koen: My objection.

The Court: Well, hasn't he said he can't tell?

Mr. Koen: He said he doesn't remember twice.

XQ. Well, three days after? A. I don't recall just now.

XQ. A week after? A. No, it wasn't a week.

XQ. Some time less than a week? A. Yes.

XQ. And at that time, sir, whether or not you had occasion to sign any statements? A. The only thing I signed was a piece of paper saying I was in the bank. I didn't sign anything, I just—

XQ. All right, you didn't sign it. At that time, were you shown any pictures? A. No.

XQ. And did you have a subsequent interview with the Federal Agents following your interview at Canton Police Headquarters less than a week after the incident on July 18, 1957? A. I don't believe so.

XQ. Did you ever have an interview in addition to the one you say you had less than a week after July 18th?

Mr. Koen: I object. Did he even have an interview—well, just object, I will object.

The Court: Do you want to reframe that?

Mr. O'Donnell: I will be glad to, your Honor.

XQ. Mr. Witness, you have told us about one interview with FBI Agents, right? A. Yes.

XQ. Less than a week after July 18, 1957. Whether or not you ever had one in addition to that one, after that?

The Court: He means, did you ever talk with him after that time?

The Witness: No.

The Court: He is not asking you to fix the time. He is asking you if you ever did.

The Witness: No.

XQ. Did you ever see the men you talked to after that time, the FBI Agents? A. Yes.

XQ. And where did you see them? A. At the Grand Jury.

XQ. And did you talk to them then, sir? A. No.

XQ. And have you seen them since? A. No.

XQ. And have you related the story you related here on the stand to anyone else in addition to these FBI Agents? A. No.

XQ. Now, whether or not you were ever shown a picture of one Donald Lester? A. Yes.

XQ. And when did that occur? A. That was the day they took us into the gas station.

XQ. And were you shown other pictures the day they took you into the gas station? A. Yes.

XQ. And whether or not, sir, when you made your observation at the gas station you felt it resembled the picture of Donald Lester? A. Yes.

The Court: Were you shown more than one picture when you were near that gas station?

The Witness: Yes.

The Court: You were shown a number of pictures?

The Witness: Yes.

The Court: And you picked him out of one that resembled him?

The Witness: Yes.

The Court: Did this take place right at the gas station?

The Witness: Yes.

XQ. As a matter of fact, Mr. Witness, the visit to the gas station was the next day? I believe it was.

XQ. And if I were to tell you that the person working in the gas station on that day that you looked was Arnold Campbell, would you then change your testimony regarding Mr. Donald Lester?

Mr. Koen: I object.

The Court: I exclude it. He said he was shown a picture. Your question was, was he shown a picture of Donald Lester and he said yes, he was.

XQ. And my next question was, did the person in the gas station resemble the picture of Donald Lester?

The Court: No, you didn't ask him. You asked him another question. You may ask him any question you want about the other.

Mr. O'Donnell: Would you kindly have the stenographer read what I asked?

The Court: Certainly. Read it.

[The previous examination was read.]

The Court: He said he looked at some photographs at that station. Isn't that what you said?

Mr. O'Donnell: I now ask the Court to let the stenographer, Mr. Hunt, read back my question that related to pictures, about the three or four questions previously.

The Court: No, you go ahead with this question. We are not going to go back. I am ruling on this question now. I let the others in. You ask for three or four questions back, and the Government will ask for three or four more, and we will be reading these questions back interminably. The trial has gone quite a distance, and I will rule on this one. You may have the question if you reframe it. I will exclude it in that form.

Mr. O'Donnell: If your Honor please, may I approach the bench to recite the grounds of my objection?

The Court: Certainly.

[Conference at the bench, at which the following was recorded:

Mr. O'Donnell: Your Honor, the defendants contend at this point that it is prejudicial for them not to be allowed to pursue this line of questioning, that in fact the witness said that he was shown a picture of Donald Lester when he was at the gas station,

and the witness further said that the picture of Donald Lester resembled the man that was working at the gas station.

The Court: That is right, but you didn't hear what else he said; you are forgetting that he was shown a number of other pictures at the station, and he picked this one out.

Mr. O'Donnell: I say what I just recited is in that record, and Mr. Hunt could have read it.

The Court: I am excluding the question in that form, and I am not excluding you from asking him that question that involves the presence or nonpresence of Arnold Campbell there at that station. You certainly have the right to do it.]

The Court: You see, these questions are asked and answers given, and then the weight of those questions, the logical force of the answers, is for the Jury. The Jury have a right to accept all of the witness' testimony, or part of it, or reject all of it; those are all matters set aside for a sanctuary that is exclusive for your consideration, and not mine.

So I want the record to be clear that I am excluding the question in that form, and I am permitting you to interrogate the witness in connection with the answer that this witness gave on the stand in connection with the photograph. Anything that will indicate—a formal question and answer that will show a contradictory state of mind so far as this witness is concerned, Mr. O'Donnell, you have a right to go forward and show it.

Mr. O'Donnell: I would like to start by having my question—

The Court: I have already ruled.

Mr. O'Donnell: All right, I object.

The Court: The Jury knows what it is. How far back is it?

Mr. O'Donnell: It is only about—

The Court: I am going to allow Mr. Hunt to read back the three or four questions when we come back this afternoon, so that you can go ahead with it.

XQ. Now, Mr. Witness, while you were parked at this gas station—it was some place in Roxbury, was it? A. I don't know the name of the town. It was in Boston.

XQ. And that was the day after July 18, 1957?

A. Yes.

XQ. And about how long were you parked there?

A. About 15 minutes.

XQ. And was this person brought over to the car? A. No.

XQ. And while you were in the car, you had an opportunity to observe him moving about the gas station, right?

A. Yes.

XQ. And as you say, while he was moving about there you were shown a picture of Donald Lester? A. I don't know; I didn't know the name.

XQ. And the person you saw moving about the gas station resembled the person you pointed out today as being Donald Lester; that is so, isn't it? A. Which one was Donald Lester?

XQ. The one in the middle, Mr. Witness. A. Will you ask me that question again, please?

XQ. And you say that someone you saw in the gas station on that day resembled someone you had seen in Canton on July 18, 1957, right? A. I didn't definitely say yes or no.

XQ. What did you say?

The Court: Those are the questions you want to have read to you, Mr. O'Donnell. You see, I told you I would have them read back this afternoon and we can confirm it. I will let you go ahead on that when we come back.

Mr. O'Donnell: Well, I think strategically I would like to have them read now.

The Court: Well, I am in charge of this court, and I have made the direction that they will be read at the proper time, and then you will be refreshed by it. I had one already read, and it turned out my position was right in it. Then I told the Jury to disregard it. You were the one that objected to it.

XQ. Now, did you say, Mr. Witness, you didn't point out anyone definitely in the gas station? A. Yes.

XQ. All right, with certainty. So as a result of viewing this person in the gas station, what if anything did you—someone asked you the reason why you went there to view this person, they asked you whether or not he was one of the men you saw on July 18, 1957, right? A. Yes.

XQ. And you wouldn't say so definitely, right? A. Yes.

XQ. What did you say? A. I believe all I said was that he resembled them.

XQ. Now, he resembled which one of the men in the court room?

The Court: He doesn't know these men, he says. Looking at the three men, which was the man you say was working in the gasoline station?

[A pause.]

The Court: You can disregard that and go ahead. There they are, and you can ask any question you want, Mr. O'Donnell.

XQ. Now, of course, Mr. Witness, isn't it so that the man you meant as resembling, that you saw in the gas station on that day, is the man in the middle in the court room today? A. I am not quite sure, because I was a distance back from him.

XQ. Who did you mean? A. Whom did I mean?

XQ. Whom did you mean he resembled? A. I don't quite understand you.

XQ. You say you are not sure now. You say that on July 19th at the gas station you observed a colored fellow working there and that he resembled someone that you saw on July 18, 1957. I have asked you whether or not it is the man in the middle that you meant, and you said, "I am not sure," so my question now is, Who did he resemble?

Mr. Koen: My objection.

The Court: Well, I will recess until quarter-past two.

Mr. O'Donnell: Your Honor, may I ask that the witness be instructed not to talk to anybody during the —?

The Court: No, I will not instruct the witness not to have any conversation with anybody. A witness on this witness stand has a right to talk to the Government and he has a right to talk to you, and no one has a proprietary interest in a witness. The Government has a right to try cases and take witnesses into their offices and talk to them before they go on the witness stand, and there isn't anything improper about it. And as a matter of fact, it is the proper thing to do in order to determine the truth.

Mr. O'Donnell: Mr. Witness, will you talk to me during the recess?

The Court: Pardon me. I have recessed until quarter-past two. No, he won't talk to you. He shouldn't talk to you while you have him under cross-examination; you can talk to him afterwards. You can be sure Mr. Koen isn't going to talk to him.

[Luncheon recess.]

Mr. O'Donnell: May I now have Mr. Hunt read the testimony?

The Court: I thought you would have it read already. I gave you time. I had another engagement and I thought that would be done, but it is all right.

Mr. O'Donnell: Would you please, Mr. Hunt—?

The Court: I will have it read up here at the bench; I don't want to emphasize certain questions and answers.

It is agreed, Mr. Foreman and ladies and gentlemen, that all the testimony with reference to the observations made by this fine citizen were made at a point near the gasoline station so that he could have a view of the gasoline station, but not in the gasoline station proper. Is that a fair statement?

Mr. O'Donnell: Oh, no, I would say he had a view of the gas station,

The Court: Yes, at a point where he could have a view of the gasoline station without being on the gasoline station proper, because I thought when they said the gasoline station he was in there, in the driveway or some part of the property. But he was close enough so it is agreed he could observe the gasoline station.

[Conference at the bench, at which the following was recorded:

The Court: And that he viewed some pictures, one of which he said was a picture of Donald Lester who resembled the man that he saw there.

Mr. O'Donnell: No, your Honor, it says in this record that this man saw the picture of Donald Lester and that he resembled the man working in the gas station.

The Court: No. Read the question, please. If he said that, you are entitled to hear that.

(The previous testimony was read as follows:

"Q. Now, whether or not you were ever shown a picture of one Donald Lester? A. Yes.

And when did that occur? A. That was the day they took us into the gas station.

Q. And were you shown other pictures the day they took you into the gas station? A. Yes.

Q. And whether or not, sir, when you made your observation at the gas station, you felt it resembled the picture of Donald Lester? A. Yes.

The Court: Were you shown more than one picture when you were near that gas station?

The Witness: Yes.

The Court: You were shown a number of pictures?

The Witness: Yes.

The Court: And you picked him out of one that resembled him?

The Witness: Yes.

The Court: Did that take place right at the gas station?

The Witness: Yes.

Q. As a matter of fact, Mr. Witness, the visit to the gas station was the next day? A. I believe it was.

Q. And if I were to tell you that the person working in the gas station on that day that you looked at was Arnold Campbell, would you then change your testimony regarding Mr. Donald Lester?

Mr. Koen: I object.")

Mr. O'Donnell: And that testimony, he said when he looked at the picture of Donald Lester at the gas station that the man he viewed, the colored man in the gas station, resembled—

The Court: No, he hasn't said any such thing, and that doesn't say so.

Mr. O'Donnell: It does say so.

The Court: No, it doesn't. He said he was shown a lot of pictures and he picked Donald Lester's picture. He said he resembled the man.

Mr. O'Donnell: Could I have the privilege of having Mr. Hunt, for my personal edification, read that once more.

The Court: Well, I do it for your benefit. Mr. Witness—

Mr. O'Donnell: The record will also show I talked about a colored man being in the gas station.]

The Court: Mr. Witness, you remember you testified when you went to a point near the gasoline station, you said you were shown a lot of pictures?

The Witness: Yes.

The Court: Who showed you the pictures?

The Witness: The police officer, the Boston police officer.

The Court: And when you were shown those pictures, were you asked to identify any of those pictures as looking like any of the men whom you saw at the Canton branch of the Norfolk County Trust Company on the 18th of July? [1526] The Witness: Yes.

The Court: And when you said that Donald Lester resembled one of them, were you talking about having resemblance date back to the time that you went through the experience you have just described to the Jury on the 18th?

The Witness: Yes.

The Court: That settles it.

XQ. And did you also mean, Mr. Witness, that the man in the gas station—

The Court: Now, please. I will not allow that question to be asked, in the light of what he says.

Mr. O'Donnell: Objection.

The Court: Now, have you got anything else, Mr. Witness? Do you care to add to that? I am talking about when the pictures were shown to you.

The Witness: No. When the pictures were shown to me and we observed the fellow working in the gas station?

The Court: That is what Mr. O'Donnell wants to know. When the pictures were shown to you, were they shown

to you at the time that the man working in the gasoline station was there?

The Witness: Yes.

The Court: Now, what was said to you at that time?

The Witness: They asked if I recognized him.

The Court: They asked you if you recognized who?

The Witness: The man that was working in the gas station.

The Court: And what did you say?

The Witness: I said that I thought he had a slight resemblance to one of the men that had robbed the bank.

The Court: These pictures had no names on them, did they?

The Witness: I didn't see any.

The Court: When you were shown the pictures of the man you picked out here as resembling Donald Lester, did you intend to have that refer to the man in the gasoline station—note how I am putting this, I am putting it fairly for both sides—what did you intend to have it relate to, the man whom you turned around to when you were told—when a gun was put up to your back at the bank?

The Witness: I don't know if I follow you.

The Court: Did you intend to have that associated with the man in the gasoline station, or when you picked out the photograph did you intend to pick out a photograph of a man you saw at the bank whom you identified, for the purpose of the record, as Donald Lester, and whom you say resembled the man that was in back of you and whose face you looked at when you turned around at the time when you saw the gun in front of you?

The Witness: The man in the gas station was not the man who had the gun.

The Court: That settles it.

XQ. Mr. Witness, whether or not you talked to me during the recess? A. No.

The Court: There is no accusation that he did.

XQ. And whether or not you had a conversation about your testimony during the recess; yes or no? A. No.

XQ. And as a result of the question of the Judge, that helped your memory so you were able to answer the way you did? A. Yes.

The Court: I asked that question for the record because there was a misunderstanding between the United States Attorney and counsel as to what this man said, even after it was read, the record will show, to Mr. O'Donnell three times.

Mr. O'Donnell: Your Honor, there is no misunderstanding in my mind or counsel's mind, and we will all make affidavits under oath as to what we heard, notwithstanding Mr. Hunt.

The Court: You stop making those statements, and I am giving you a warning. That is a grossly improper statement. You can interrogate this witness to your heart's content.

I asked the question fairly, and then said to you, "I am wording this question so that it can be considered favorable to both sides," and the witness gave the answer that he meant two different identifications, and when he said he picked the man at the station he didn't mean the first man whose photograph he saw. And that is in keeping with the answer he gave in direct examination to Mr. Koen, except that isn't as elaborate.

I didn't refresh his recollection. I am not refreshing the recollection of any witness. I am here to see to it that this Jury gets this case, and gets this case in fairness to the rights of all parties, the sovereignty of the United States and these defendants, with due regard for the proper administration of law, to be administered with justice and with courage.

Those remarks of Mr. O'Donnell may be stricken, and

so may the last question and answer be stricken that he asked.

You notice when I asked that question, there wasn't a single, solitary objection on the part of anybody. If they had, I would not have pressed for the answer.

Now, the answer was given by the witness, and you may cross-examine him with reference to it. Any more questions?

Mr. O'Donnell: Yes, your Honor.

XQ. You talked about making an observation of a white shirt, Mr. Witness. Can you describe that for us? A. Well, it was a white shirt with short sleeves.

XQ. Can you tell us anything else about it? A. Buttoned in the front.

XQ. And what kind of a collar did that shirt have? A. I don't know.

XQ. Now, after your one conversation with the FBI Agents, whether or not at the time you visited the bank in July, were you self-employed then? A. Yes.

XQ. And how did you approach the bank? A. From the sidewalk.

XQ. Did you walk to the bank that day or ride to the bank? A. I rode to the bank and walked from my truck into the bank.

XQ. Where did you park your truck? A. On the side of the bank.

XQ. Now, when did your first conversation with law enforcement officials take place?

Mr. Koen: Object. I think we have already covered it.

The Court: Well, I suppose what you mean is investigative agencies, isn't that right?

Mr. O'Donnell: Yes, your Honor.

The Court: Law enforcement officials might well be the Department of the Attorney General of the United States. They both belong to the executive branch of the

Government. And I assume you mean by that, with the police or the FBI?

Mr. O'Donnell: Yes, your Honor.

The Court: With that explanation, you may have the answer.

The Witness: The first person I talked to was a State trooper.

XQ. And that was on July 18th? A. Yes.

XQ. And then the next day you had the visit to a gas station? A. Yes.

XQ. Did you talk with police officers that day?

A. Yes.

XQ. And the first time you were introduced to an FBI agent was when? A. That day.

XQ. That day is the day you went to the gas station? A. Yes.

XQ. Was he with there? A. Where?

XQ. At the gas station. A. The FBI man?

XQ. Yes. A. No.

XQ. Did you see him anywhere near there? A. No.

XQ. And how long did you spend at the gas station? A. Possibly 10 or 15 minutes.

XQ. And observing the man in the gas station, the colored man working around the gas station, did you get a better view of him in the 10 or 15 minutes on July 19th than the observations you made of the people in the bank on July 18th? A. No.

XQ. So how much of a view did you get of the colored man at the gas station on the 19th? A. He was in the station and then came out to work on a car, and I got a glimpse of him as he went to the car, with his back to me quite a bit of the time.

Mr. Koen: What was that last?

The Witness: He had his back to me. He was working on the car.

XQ. So at best at the station, then, you got a glimpse?
A. Yes.

XQ. And at best in the bank you got a glance; is that right?

The Court: You mean of which one?

Mr. O'Donnell: In the bank.

The Court: A Glimpse of whom?

Mr. O'Donnell: I withdraw the question.

XQ. How many people did you see in the bank on the 18th besides customers and employees?

The Court: I will exclude it. It has been gone over.

XQ. Sir, in the bank, as against the gas station, as to the man in the blue suit, right? A. In the bank?

XQ. Did you get a glance at him?

The Court: Which is the man that you claim was the man in the blue suit?

Mr. Koen: There is no testimony as to that, sir.

XQ. Sir, did you testify about seeing a man in a blue suit?

Mr. Koen: Wait a minute.

The Court: I am going to exclude it because it has been gone over several times. You have cross-examined him several times about the man in the blue suit and the man that wasn't in the blue suit.

Mr. O'Donnell: Objection.

The Court: I did it because you have covered it.

Mr. O'Donnell: Object.

XQ. Now, Mr. Witness—

The Court: You mean you object because I say that you have covered it? You have covered it.

Mr. O'Donnell: Well, I legally disagree with you, your Honor.

The Court: You may legally disagree, but the Jury will understand that you are not sitting here as the Judge.

I am, and I am making the ruling. You have been over it, and I am not going over that field again.

Mr. O'Donnell: All right.

XQ. Mr. Witness, there is no doubt in your mind, is there, that in respect to the observations that you have made, bank, gas station, that the best observation you have had with both your eyes, and not out of the corner of either one of them, has been here in the court room?

Mr. Koen: Wait a minute.

The Witness: No.

The Court: That is a characterization. The weight of it is for the Jury, and I am going to exclude the question in that form.

Mr. O'Donnell: Objection.

The Court: You know, whenever he makes an objection, that is his right. But whenever I make a ruling, please accept my formula. I say it with a lot of humility. I will give these attorneys every chance in the world.

And I want to say parenthetically, at the expense of being repetitious, that the statement made by counsel was entirely inappropriate, and I don't want you to hold it against these defendants, not at all. No use of words by counsel for the Government or by counsel for the defendant, or any impression that is indicated by an act of the Court, should be considered against these defendants.

XQ. Now, Mr. Witness, which one of the men here in the court room, if any, do you say you saw in the gas station?

A. The man on the extreme left.

XQ. That would be your extreme left? A. Yes.

XQ. This man here [indicating]? A. Yes.

XQ. And you remember when I asked you if you would change your story if I told you that it wasn't Donald Lester in the gas station, that it was Arnold Campbell; before lunch you remember my using that language?

The Court: And I excluded the question, so therefore it wasn't answered.

XQ. So therefore you recall my asking that question?

The Court: Well, when I excluded it, I excluded it, period, and there was no answer from the witness. Obviously the witness can't be penalized if he is not allowed to answer a question under the direction of the Court.

Mr. O'Donnell: Objection.

XQ. Mr. Witness, you recall, in testifying to the time it took to walk over there and face the wall in the public space, to the time you were instructed to put your hands up, was a matter of seconds; that is a fact, isn't it? A. Yes.

XQ. And that the look you got at the man in the blue suit was when Officer Fitzgerald was escorted over there, and other customers of the bank were escorted over there, right? A. Yes.

XQ. And that was a side view, right? A. Yes.

XQ. And did you get both your eyes turned for that side view? A. Yes.

XQ. So that that wasn't a—that person wasn't constantly at your side in the blue suit while you were in the bank facing the wall, was he? A. No.

XQ. Now, therefore, your observation from your side as to the man in the blue suit, we know now that as to the man that you say said "Stick them up" and put a gun, the muzzle of which was facing toward your head, that observation was a matter of seconds, and that your observation of the man in the blue suit was one that was not constant, that was interrupted, and therefore how many glances would you say you got at the man in the blue suit?

The Court: Now, I will exclude that. I exclude that statement because the weight of it is for you. The witness said when the man said "Stick them up," he turned around and looked into the face of a man who had a gun pointed

at his head. I am going to exclude it; it has been gone over two or three times.

Now, with reference to the other man, I have given you full opportunity. There is no dispute over it, Mr. O'Donnell, he said he glanced. When you said you glanced, what did you mean by that? You turned your head?

The Witness: Yes.

The Court: The witness said he turned his head. He said, "Can't I turn my head without turning my body?"; that was one of the answers he gave you.

XQ. Now, Mr. Witness, how much time, counting all the looks you took to the left, would you say you used in looking at the man in the blue suit?

Mr. Koen: Object.

The Court: I am going to exclude it on the grounds that you have covered it fully at least twice.

Mr. O'Donnell: Object.

The Court: Well, I will let it be answered for the last time. Go ahead and answer it.

The Witness: Could you give me the question again?

The Court: Read it, please.

[The question is read.]

The Witness: I don't know. I didn't count up the time, and I have no idea of how to count the time.

XQ. Now, sir, I will put this question to you, wouldn't you say that as against what you have testified that your observation was in the bank on that morning, that the observation you have had in this court room has been a better observation? A. Yes.

Mr. Koen: Object. That is argumentative.

The Court: I am excluding it.

Mr. O'Donnell: Objection.

The Court: You mean the observation he has had here in comparison with the observation he had of the man whom he turned around and saw with a gun in his hand, and

whom he identified? The weight of that is for the jury. You have a right to argue it, and so does Mr. Koen. And I will express no viewpoint on it.

XQ. Now, Mr. Witness, as to the man you say you saw in the blue suit in the bank on that day, when you say someone in the court room here resembles him, will you tell me once again who the person is?

The Court: I am going to exclude that, because it has been gone over.

XQ. Now, in so far as the bank is concerned on that day, the fellow you testified had a white shirt on and the other fellow a blue suit—?

The Court: Is that the end of the question?

XQ. The man that was in the gas station, who did he resemble as to those descriptions?

The Court: That has been gone over; he has answered that. He didn't say he resembled him; he said it was that man. That was his last answer. Didn't you say that? The man you saw at the station, did you say here to this jury that he was the man that you saw in the bank?

The Witness: I said he resembled him.

The Court: There is no dispute over that.

XQ. Did you have any description whatsoever of the third man, Mr. Witness? A. No.

XQ. Isn't it so, Mr. Witness, that in view of the type of observations you made in the bank in regard to the person that said, "Stick them up," that it was so slight that you wouldn't want to make—?

The Court: Don't answer that.

XQ. Don't answer it until I finish the question.

The Court: I am going to tell him not to answer it, because I am not going to let him answer it when you finish.

XQ. It was so slight that that is what caused you to say to Mr. Koen, "Do I have to answer it?" when you were back here?

The Court: I will exclude that question. It has been gone over several times.

Mr. O'Donnell: Objection.

XQ. When you hesitated back here, wasn't that because you had such a slight chance—?

The Court: I exclude it.

XQ. —to observe in the bank?

The Court: I exclude it, because it has already been covered.

XQ. Now, in regard to your testimony about observation, Mr. Witness, would you prefer to leave it—would you prefer to leave it as to anyone you have identified merely resembling?

Mr. Koen: Object.

The Court: I will exclude that.

Mr. O'Donnell: Objection.

The Court: He has already testified.

Mr. O'Donnell: May we approach the bench, your Honor?

The Court: Certainly.

[Conference at the bench, at which the following was recorded:

Mr. Louison: Your Honor, at this time we should like to request under the statute Public Law 85-269 of the 85th Congress, the statement of this man.

The Court: I am denying it because you have laid no foundation for it as you did the last time; this man said nothing was ever read back to him, so I am denying it and your rights are saved.

XQ. Now, Mr. Witness, when you said you had a conversation with the FBI some time less than a week after July 18, 1957, did they write down what you had to say to them?

The Court: If you know.

The Witness: Yes.

XQ. And did they read it back to you, sir? A. Yes.

XQ. And did they ask you if that was essentially what you had just related to them? A. Yes.

XQ. And did you tell them yes? A. Yes.

XQ. And you adopted that as your—?

Mr. Koen: I pray your Honor's judgment.

Mr. O'Donnell: All right, I will strike that. Now, we move again, your Honor, under the—

The Court: I will order it produced. There is a foundation laid for it.

[Conference at the bench, at which the following was recorded:

The Court: Will you come up here, Mr. [1541] Witness?

(The Witness complied.)

The Court: Now, Mr. Witness, you testified here on cross examination that you talked to the FBI Agent and that he asked you questions, as I remember it, and that you didn't know what he had written down because it was not read back to you. Didn't you testify that way?

The Witness: I didn't remember. Since then I have recollected. He didn't actually ask me questions, I mean, at first I told him the story, and then when I got through he asked me a few questions.

The Court: Well, did he read it back to you?

The Witness: I believe he did.

The Court: What is your best memory of it?

The Witness: I am pretty sure he did.

The Court: Is your memory such as to enable you to say that what was read back to you was an accurate statement of what you told him?

The Witness: Yes.

Mr. Hubley: Will your Honor ask him whether he made a written statement?

The Court: He didn't.

Mr. Hubley: Then you have got to proceed under (e) (2), which provides for oral statements, because (e) (1) provides for written statements only.

The Court: (e) (2) says (reading),

"A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to be an agent of the government and recorded contemporaneously with the making of such oral statement."

Mr. Hubley: And adopted and approved by him.

The Court: He just said it.

Mr. Hubley: He can't, because what we have in our possession he has not seen, so he couldn't have adopted it.

Mr. Koen: It was not in existence at the time he was being questioned.

The Court: I will permit the witness to do what the other witness—

The Witness: If you will excuse me, I am trying to rack my brain to think about what happened. I think they wrote down what I said, and then I think they gave it back to me to read over, to make sure that it was right. And I think I had to sign it. Now, I am not sure. I couldn't remember before—

The Court: And he said it was read back to him. So if that is a transcript—

Mr. Hurley: It isn't. It is a report by an FBI Agent, which is a summary of the result of the interview. It is his interpretation of what happened.

The Court: Have you got in your possession any statement that was copied by an FBI Agent which in any way would reflect a statement that this witness

made and which he substantially adopted as the statement?

Mr. Hubley: No, your Honor, we don't.

The Court: Well, could I see the statement that you have?

Mr. Hubley: Surely (handing).

The Court: There is no objection to my looking at the statement?

Mr. Koen: No, sir.

Mr. O'Donnell: No, your Honor.

The Court: I am going to ask the witness, inasmuch as it is agreed that this is something which was not prepared by this witness, but which is a report prepared—I will say this, it is a report prepared by the FBI Agent, and Special Agent John F. Twomey; I will ask you to read that over, Mr. Witness.

Mr. Koen: Judge, please (handing book).

Mr. Hubley: That would have to be a transcription of something taken down substantially verbatim at the time he said it.

The Court: It says "a stenographic, mechanical, electrical, or other recording."

Mr. Hubley: And it says, "recorded contemporaneously with the making of such oral statement." The FBI man would have to transcribe something which he recorded at the time of the oral statement verbatim. Otherwise, that is the agent's interpretation of what he heard that day.

Mr. Koen: If it were an oral statement made by this witness, it would be in the first person. That is in the third person.

The Court: If this is a substantial recording of an oral statement, it comes within the purview of (2).

Mr. Hubley: That has to be a transcription which is a reproduction in some form—

The Court: No, all it has got to be is a substantially verbatim recital of an oral statement.

Mr. Koen: Taken under certain conditions and those conditions are not in existence here.

The Court: A stenographic, mechanical, electrical or other recording.

Mr. Koen: "Recording" has a very limited meaning.

Mr. Hubley: And recorded contemporaneously with the oral statement.

The Court: I will reserve on that and make a decision tomorrow morning, and you may go ahead with something else.

Mr. Koen: Before we leave the bench, may it appear in the record that this colloquy with reference to the production of this document and the questions asked of the witness by the Court were at the bench and beyond the hearing of the jury?

The Court: That is right.

Mr. O'Donnell: I will agree to that.

(Discussion off the record.)

The Court: Has the United States in its possession any notes that were taken down by the FBI Agent at the time this witness was interviewed?

Mr. Koen: I do not have them in my possession and I do not know whether they ever existed.

The Court: Could you ascertain from Special Agent Twomey? Could you talk to Special Agent Twomey this afternoon and find out before tomorrow morning?

Mr. Koen: I shall try.

The Court: All right.]

The Court: I am going to give this matter some fur-

ther consideration. We can bring the witness back. I would like to have the cross-examination of this witness and the redirect finished on every detail except this.

Mr. O'Donnell: All right, your Honor, I am finished except for that.

Mr. Koen: I have no redirect at this time.

The Court: All right, next witness.

[589] DOMINIC STAULA, resumed

The Court: This is Dominic Staula, 259 Ireland Street, Stoughton, Massachusetts.

Now don't misunderstand me, Mr. Staula. I'm asking you questions in a perfectly friendly way because I recognize you are a fine citizen. Don't misunderstand me. I have to ask them. You remember that you testified here in connection with the circumstances surrounding the incidents of the 18th of July. You were in the bank. You testified, you identified the middle man, Lester. He was the man Lester. You remember the man made an exclamation at the time. Later on, Mr. O'Donnell—you said the man, as I remember it, looked like him and verified that later on.

Mr. Koen: No, it was the other defendant I think he was talking about at the time.

The Court: Well, you will have those things in mind; and you have in mind the fact that you talked to an FBI Agent—for the purposes of the record, you talked to the FBI Agent on the 19th. That date has been definitely fixed. There was some question about whether it was a week afterwards, but it has been definitely determined now to be on the 19th.

Now I am going to ask you to read over, I'm going to give you a copy—

Mr. Koen: May I give him the original?

The Court: All right.

Mr. Koen: And may I ask this question? Will you ask the witness if he has ever seen that particular paper.

The Court: Have you ever seen this statement?

The Witness: No.

The Court: What?

The Witness: No.

The Court: Obviously you have not shown it to me. You haven't seen this at all?

The Witness: No, sir.

The Court: Will you please read that over [handing]. Take your time.

Mr. Hubley: And may the record show that the document which Mr. Staula is reading is an investigative report.

The Court: That's right. It's an investigative report prepared by Special Agent Toomey.

[Witness peruses report.]

The Court: You will remember you testified under oath you had several opportunities to examine this man, and I want you to read that statement, and then I'm going to ask you questions.

[Witness continues perusal.]

The Court: Have you read that?

The Witness: Yes.

The Court: Now, Mr. Witness, let me ask you this question. Do you care to change in any way the testimony you gave in direct examination in connection with the means of identification at the times you saw this man? Do you?

The Witness: No. Well, I told him—

The Court: Now wait a minute, wait a minute. "No." Now let me ask you this. Where is Mr. Hurley?

Mr. O'Donnell: I object to that last question.

The Court: Well, I wanted to—That's all right. I wanted to be certain. [Confers.]

Let me ask you this now. Having read that over and

having in mind your memory of the events on that day, is that a substantially verbatim recital of what you told Agent Toomey?

The Witness: No, it is not.

The Court: I'll exclude it. I'll have it marked. I've examined it in camera, I'll have it impounded now, and I'll have it available for the record.

Mr. Koen: And only for the record?

The Court: That's right.

Mr. Koen: I think you should indicate it.

The Court: That's right. It's only for the record in case there should be an appeal.

Mr. Louison: Your Honor, we should also make now a common law demand for that statement.

The Court: Well, I know, but I'm settling this. I told you you have a right to do that. This is impounded on this order. That is, I'm following out the mandate of the statute. I have examined it in camera. I have done everything the Act says I should do. And I have a profound appreciation for your fine brief, Mr. Louison. It was a fine brief. I want to commend you on it. And I have also for my, the young genius there, who has been before me several times and whom I recognize as a boy with a fine mind. That's Norman Hubley.

M. Hubley: Thank you.

The Court: Mr. O'Donnell and Mr. Koen belong to the later day class of lawyers.

You prepared a fine brief; and I made up my mind, if the witness had answered, I was going to order its production. And I certainly haven't talked, have I?

Mr. Hubley: No, sir.

The Court: I should say not.

Mr. Louison: If your Honor please—

The Court: Now you want to make an objection?

Mr. Louison: Yes, for the failure to produce the original

document without which this witness answered questions, we move to strike this witness' entire testimony from the [1846] record.

The Court: Well, I'll deny that.

Mr. Louison: Objection.

The Court: That's right, that's all right.

Mr. Louison: And we make a common law demand for that document at this time.

The Court: All right.

Mr. Koen: For what document?

Mr. Louison: That document.

Mr. O'Donnell: That the witness just read allegedly.

Mr. Koen: And I refuse.

The Court: If he refuses, I have no power to order it.

Mr. Koen: I refuse the common law demand.

The Court: All right. So there we have it.

[Discussion off the record.]

Mr. Koen: So there will be no doubt on the record as to the position of the Government in refusing to accede to the common law demand made by the defendants, it is the position of the Government that, in view of the witness' answer to the Court's question, this document is not a document which properly can be used to impeach the witness because the witness said it is not a verbatim copy of the statement that he made.

The Court: Well, when you said it was not verbatim, you meant it didn't include the things which you told him. Is that right?

The Witness: That's not written up just the way the story is.

The Court: That's right.

The Witness: There are things in there turned around.

Mr. Koen: May the witness be excused, your Honor?

Mr. Louison: No, no.

The Court: I'll permit no further—the record shows

that outside of this cross-examination the recross examination and redirect was finished.

Mr. Koen: Right.

Mr. O'Donnell: It is not finished as far as I'm concerned with this witness because I reserved my right to cross-examine him as to this very matter.

Mr. Koen: The Court has ruled on it.

The Court: I have already ruled. Bring in that transcript.

Mr. Koen: I have a copy of it.

Mr. O'Donnell: I said I had finished with him except in relation to this matter, the matter that has been discussed this morning, and I want to proceed further with my cross-examination.

The Court: I said:

"I would like to have the cross-examination of this witness and the redirect finished on every detail except this."

This is the question we just had.

"Mr. O'Donnell: All right, your Honor, I am finished except for that."

Mr. O'Donnell: That's right.

The Court [Reading]:

"Mr. Koen: I have no redirect at this time."

Have you any redirect now?

Mr. Koen: No, your Honor.

The Court: All right.

Mr. O'Donnell: I have recross, your Honor.

The Court: I'm not going to permit you to recross.

Mr. O'Donnell: I suspended with him on condition—

The Court: No, no, you suspended with him with no condition.

Mr. O'Donnell: I did.

The Court: I beg your pardon. I am reading the answer to this. I've made up my mind we're going to

get along with this trial. What he may have said with reference to any of the other details was thoroughly covered in the cross-examination of this witness; and I then said to you, Mr. O'Donnell, and to Mr. Koen, "I would like to have the cross-examination of this witness and the redirect finished on every detail except this"; and that "this" refers to the statement that has been shown, that report that has been shown the witness. To that, Mr. O'Donnell, you said, "All right, your Honor, I'm finished except for that."

Mr. O'Donnell: And he said—

The Court: And Mr. Koen said, "I have no redirect at this time." And I'm asking Mr. Koen now—

Mr. Koen: I've answered it, No, sir.

The Court: What?

Mr. Koen: I've answered it.

The Court: Have you any?

Mr. Koen: No.

Mr. O'Donnell: The witness has just been allowed to testify here this morning without cross-examination.

The Court: No, no, wait a minute, because I—listen. The obligation is mine, I'm going to determine that, and I've made the determination. Your rights are saved, and I'm ordering—

Mr. Louison: We had objected to his reading that statement.

The Court: I know, but I've taken that step in doing it. I don't know how the man can say anything substantially different unless he read it, and obviously he hadn't read it, and I let him do it and he said it doesn't represent what he told the Agent. I have followed the dictation, the mandate of the Act of Congress and, whether I'm right or not, I have done it in good faith. I have made it clear in a conference out there where

I gave each one of you the opportunity to explain your position, and where, in its final analysis, Mr. Louison and Mr. O'Donnell, I took the position, and Mr. Koen and Mr. Hubley objected to it—if this witness said this was substantially verbatim, that it represented what he said to the Agent, I would have ordered it produced. I told you that, and you know I came in here and asked the question. Mr. Koen and Mr. Hubley said they had not shown it to him. It is certain that I haven't, because I wouldn't have wasted my hours. I was up until the wee hours of the morning trying to discover the Holy Grail. That's what it amounted to. That's what I did.

Mr. Louison: The record is completely without explanation as to the original document.

The Court: The record—the statute says, that Act says it shall be taken and examined in camera, and that means—that's what the word says, and I've done that. I have complied with the mandate. I've asked the question, I've shown it to the witness, he says it doesn't represent what he said. Now I have ordered it impounded.

Mr. Koen: On the record, I would like to make the note that, in view of the last statement made by counsel for the defense, apparently they are shifting position into a sphere which I was trying to get them to determine this morning what specific document they wanted. Now they say the original document is not explained. I would like to say this, Judge, and then I'm going to be through: That these questions asked by you of the witness, it should appear on the record, were made in the complete absence of the jury.

The Court: That's right.

Mr. Koen: They were made at the bench with counsel present and with the defendants present in the court room, and you have made your determination under those conditions.

The Court: And I will say further, that for one hour, an hour and a half I had a conference in my lobby, in the absence of everybody but with the court reporter there—the record speaks for itself—wherein I listened to arguments and we had a full discussion of the briefs, and where I finally decided and made a conditional decision in favor of the defendants.

Mr. O'Donnell: I object to the decision.

The Court: Predicated upon the answers of the witness.

And the witness has given the answer.

Go ahead and bring the jury down. We'll go on with the case.

Special exhibit

FEDERAL BUREAU OF INVESTIGATION INTERVIEW REPORT

Mr. Dominic Staula, home address 259 Island Street, Stoughton, Massachusetts, a customer at the victim bank, advised that he arrived at the Norfolk County Trust Company in Canton, Massachusetts, to transact some business at approximately 10:15 A.M., July 18, 1957. Mr. Staula stated that he was driving a truck and parked it beside the Canton Depot in the parking area located between the railroad depot and the bank. He stated that he noted nothing unusual when he entered this parking area nor did he notice anything unusual in walking from where he parked his vehicle to the bank.

It was stated by Mr. Staula that he went to the teller's window which is served by Mr. Kennedy and while standing in line at this window, but before being waited upon by Mr. Kennedy, he heard somebody state from behind him "Over against the wall."

Mr. Staula stated that he looked around and observed a man whom he described as being a negro, wearing gray chino pants, standing in the center of the lobby and holding a gun. Staula stated that he immediately realized that the bank was being held up and at once took his deposits which consisted of cash and slid them into his side trouser pocket.

Mr. Staula went on to state that he only observed the man standing in the center of the lobby for an instant and could give no further description of him because he turned toward the front of the bank and observed another man standing there holding a gun. Staula stated that he looked at this man for a short period of time and described him as follows:

Interview with Dominic Staula, File #91-952, on July 19, 1957, at Canton, Massachusetts, by Special Agent John F. Toomey, Jr., bjp.

Property of FBI.—This report is loaned to you by the FBI and neither it nor its contents are to be distributed outside the agency to which loaned.

Sex.....	Male.
Race.....	Negro.
Age.....	Approximately 30 years.
Height.....	5'10".
Weight.....	165 pounds.
Complexion.....	Very dark.
Build.....	Slender.
Face.....	Round.
Clothing.....	Dark blue suit.
	Blue snap brim hat.
	White shirt.

Mr. Staula stated that he did not observe a third man in the bank—

It was stated by Mr. Staula that he did not know what type of gun was carried by these two individuals whom he observed but believed that they could have been 45 caliber automatics.

Mr. Staula stated that after taking a look at the individual wearing the blue suit he faced the wall as previously ordered and observed these individuals no further.

He stated that after he stood with his face to the wall for approximately 10 minutes one of the robbers ordered him and the other people who were standing on either side of him to walk into the vault. He stated that he does not recall which of the robbers issued this order but that he did enter the vault as directed and observed these individuals no further.

Mr. Staula stated that one of the robbers, closed the door of the vault he issued some order to the effect that the people locked inside should not leave and that they stayed there for 5 or 10 minutes until the vault door was opened by Sergeant Ruane of the Canton, Massachusetts Police Department.

In United States Court of Appeals for the First Circuit

Minute entries

On June 3, 1958, each appellant filed a motion and affidavit for leave to appeal in forma pauperis and on June 5, 1958, the Court denied the motions of the three appellants for leave to proceed herein in forma pauperis.

Thereafter, on June 19, 1958, appellants were granted leave to file their consolidated brief and record appendix in type-written form.

Thereafter, on August 21, 1958, appellants filed a motion for reconsideration of their motion for leave to appeal in forma pauperis and on September 10, 1958, the Court denied said motion.

Thereafter, on November 10, 1958, appellants filed a motion to complete the record on appeal which motion the Court denied on November 18, 1958, the exhibit to the affidavits of bias in Criminal No. 57-260-M, consisting of a photocopy of the arraignment proceedings, having been transmitted to this Court in these cases by order of the District Court.

Thereafter, on June 5, 1959, these cases came on to be heard and were fully heard by the Court, Honorable Calvert Magruder, Chief Judge, and Honorable Peter Woodbury and Honorable John P. Hartigan, Circuit Judges, sitting.

In United States Court of Appeals For the First Circuit

No. 5371.

ALVIN R. CAMPBELL,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE;

No. 5372.

ARNOLD S. CAMPBELL,

DEFENDANT, APPELLANT,

v.

SAME;

No. 5373.

DONALD LESTER,

DEFENDANT, APPELLANT,

v.

SAME.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge*, and WOODBURY and
HARTIGAN, *Circuit Judges*.

Lawrence F. O'Donnell and *Melvin S. Louison* for appellants.
William J. Koen and *Norman A. Hubley*, Assistant U. S. Attor-
neys, with whom *Anthony Julian*, United States Attorney, and *John F.*
Palmer, Attorney, Department of Justice, were on brief, for appellee.

OPINION OF THE COURT

August 27, 1959.

HARTIGAN, *Circuit Judge*. Each of the three defendants was convicted in the District Court of the United States for the District of Massachusetts on seven counts of an indictment charging violations of the Bank Robbery Act, 18 U.S.C. § 2113. Count 1 charged that the defendants violated § 2113(a) and Count 2 charged them with violating § 2113(b). Counts 3 through 7 charged them with the aggravated offense set forth in § 2113(d). Each of these latter five counts alleged that the defendants put in jeopardy the life of a different customer or employee during the commission of the bank robbery set forth in Counts 1 and 2.

The bank robbery was alleged to have taken place in the Canton Branch of the Norfolk County Trust Company in Canton, Massachusetts, on July 18, 1957.

The defendants do not contend that the Government failed to provide sufficient evidence to warrant finding them guilty but rather claim that the district judge committed such serious errors in the conduct of the trial as to deprive them of a fair trial. They charge that the district judge went beyond permissible bounds in commenting on the evidence and in the examination of witnesses and that his charge to the jury was argumentative in nature and was unfairly partisan in favor of the prosecution. They further contend that their right of cross-examination of the Government witnesses was erroneously curtailed and that the court further erred in allowing evidence as to a purported admission made by one of the defendants. A further point raised by the defendants concerns the refusal of the district judge to permit the defendants to examine a pre-trial report involving one of the Government witnesses.

The latter point concerning the denial of the right to examine this pre-trial report does not warrant extended

discussion in view of the recent decision of the Supreme Court in *Anthony M. Palermo v. United States*, ___ U.S. ___, decided June 22, 1959. It seems clear that the district judge in the instant case did not commit error in holding that an F.B.I. investigator's summary of an account of the bank robbery by a Government witness was not a "statement" under subsection (e) of the act of September 2, 1957, 71 Stat. 595, 18 U.S.C. § 3500, the so-called "Jencks" Act. It is to be noted that prior to the district judge's action he *in-camera* discovered that this witness had never seen the report in question and that the report was not a substantial verbatim recital of what had been told to the F.B.I. agent. Under these circumstances the determination of the district judge was justified.

The defendants also charge that the district court committed reversible error in preventing them from inquiring of an important Government witness "... You smoke reefers, do you, Mr. Gibson?" However, it seems evident from the context in which this question was asked that its form was unclear and that the district judge was within his discretion in excluding it on this ground, as it is quite evident by the judge's later statements he would not prevent defense counsel from interrogating on this point if the question were put in proper form. It would seem reasonable to require that the defense counsel use a more explicit term than "reefers". If the purpose of the defense counsel, which is not clear from the record, were to show that the witness was under the influence of narcotics at the moment of testifying, the question should have been whether the witness was addicted to the use of cigarettes containing narcotics. See *Wilson v. United States*, 232 U.S. 563, 567 (1914). On the other hand, if the question was intended to show that the witness was under the influence of narcotics at the time when an admission was purported to have been made to him by one of the defendants, the

proper question would have been whether at the time of that conversation the witness was under the influence of cigarettes containing narcotics. In this way the defendants would have been able to protect their right to show the possibility that this witness' testimony should not have been given as much weight as it would otherwise, but because of the improper form of the interrogation on this point the district judge was not in error in its exclusion.

The defendant, Arnold Campbell, contends that the admission into evidence of a statement made in his presence by his brother Alvin to Floyd Gibson was prejudicial error. This statement was that Alvin, Arnold and a third party had participated in a bank robbery in Boston. Gibson further testified that Arnold was present when this statement was made, in fact that he was sitting on his right during the conversation in question. Such a statement is admissible against the defendant Arnold Campbell for if it was heard by him, his silence under such circumstances could be construed as an admission. See 4 Wigmore, Evidence, § 1071 (3rd ed. 1940). The only instruction requested by the defendants concerned the scrutiny which the jury should give such admissions and the possibility of misinterpretation of the person speaking. It is the jury's function to determine whether this statement was heard by the defendant Arnold Campbell and the weight to be given it as evidence of guilt is also a jury function. The only point in the charge in which this admission is referred to was when the district judge was cautioning the jury that the facts were for the jury to find and that it was their obligation to weigh the evidence. Viewed in this context, the district judge's reference to the evidence relating to the conversation in question, although not entirely clear as to meaning, left it to the jury to find whether or not Arnold Campbell had in fact heard this statement sought to be used as an admission against him.

Another point raised by the defendants is that the district judge so abused his discretion in interrogating witnesses and in his comments on the evidence that they were deprived of a fair trial. Their contention is basically the same as that made in *Daley v. United States*, 231 F.2d 123 (1 Cir. 1956), cert. denied 351 U.S. 964 and our comments made therein are applicable in this case. It is evident here also that while much of this intervention by the district judge was superfluous it is also clear that the patience of the judge was sorely tried by the tactics and conduct of defense counsel throughout the nearly six weeks required to present the Government's case, a great portion of such period being used in prolonged cross-examination. We are of the opinion that in the instant case the oftentimes needless and verbose intervention by the district judge did not result in depriving the defendants of a fair trial but only tended to lengthen the record.

The defendants also contend that the charge to the jury contained numerous errors and also was argumentatively in favor of the prosecution. We reject the defendants' contention that the jury was not properly instructed on the presumption of innocence as the record makes clear that the jury was instructed on this point many times. Also there is nothing in the charge to indicate that the jury was instructed that it had to discover who had robbed the bank if the defendants did not and that the defendants had the burden of proving their innocence. The district judge's statement in referring to the witnesses presented by the prosecution, other than the Gibson brothers, that "There's a presumption that these citizens were good citizens; and in the absence of evidence which would satisfy you that you should disregard their testimony, they are considered to be good witnesses" standing alone would perhaps lend support to the contention that this deprived the jury of its function in determining the credibility of

their testimony. However, the district judge later pointed out that the jury was the sole judge of the credibility of the witnesses, and it should scrutinize the circumstances under which each witness testified and every matter in evidence which tended to indicate whether the witness had been worthy of belief. The district judge also pointed out that in considering the testimony of such witnesses, the jury should consider whether the individual witnesses were of a fearful nature and also what effect a loaded gun would have upon a witness' state of mind. These statements would seem to emphasize that even the testimony of these Government witnesses, who ~~did~~ not have any motive to falsify in order to escape possible self incrimination, should be carefully examined not so much in order to determine whether these witnesses were deliberately lying but rather to determine whether much weight should be given to their identification of the defendants as the bank robbers.

The defendant, Arnold S. Campbell, has also objected to an instruction to the jury that certain evidence relating to the expenditure of money in Ohio following the robbery may be considered against him. However, there was evidence linking Arnold S. Campbell with some of the benefits obtained by the expenditure of this cash. Clearly evidence pointing to a sudden increase in cash expenditure by a person concerning whom there had been substantial evidence linking him with the theft of large amounts of cash previous to those sudden expenditures is relevant. See *United States v. Howell*, 240 F.2d 149 (3 Cir. 1956), *Hansbrough v. United States*, 156 F.2d 327 (8 Cir. 1946). The district judge committed no error in his instruction on this point.

The defendants also objected to some language in which the district judge apparently attempted to instruct the jury with regard to the inference to be drawn by the failure of the defendants to present any evidence. The district judge

while correctly informing the jury that no inference whatsoever was to be drawn from the failure of the defendants themselves to take the witness stand, his instruction with regard to the presentation of other witnesses was couched in the following language: "Now, the inference drawn by common sense, and approved by law, if you find that—obviously, if it was shown that this money was money that had nothing to do with the bank, it would go to the very heart of that which would constitute the basis for the innocence of the two brothers Campbell. And Mr. Lester is in no way connected. The inference drawn by common sense, and approved by law, is that if such evidence were presented, it would be unfavorable to those defendants." This language is unclear and it is apparent that the district judge was unaware of the confused nature of his instruction. The "money" that he was referring to was undoubtedly that money which had been spent in Ohio after the robbery. It was the district judge's conclusion that there were witnesses to these expenditures who were available only to the defendants. This instruction must be interpreted as allowing the jury to infer that the testimony of these witnesses as to the source of funds from which expenditures were made would have been unfavorable to the defendants because otherwise they would have testified. In *Graves v. United States*, 150 U.S. 118, 121 (1893) the court said: "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." See *Samish v. United States*, 223 F.2d 358 (9 Cir. 1955), cert. denied 350 U.S. 848, *United States v. Conforti*, 200 F.2d 365 (7 Cir. 1952), cert. denied 345 U.S. 925 (1953), *United States v. Beckman*, 155 F.2d 580 (2 Cir. 1946). Viewed in the light of this principal, the instruction of

the district judge, although not as clear as it should have been, was not prejudicial to the defendants.

The defendants made a motion before trial to dismiss the indictment upon the grounds that the offenses set forth in the seven counts in the indictment against each individual defendant were but one offense or in the alternative that the Government be required to elect which one of the seven counts it intended to prosecute at the trial. This motion was properly denied by the district judge. See *Ekberg v. United States*, 167 F.2d 380, 385 (1 Cir. 1948). Moreover, although the defendants were sentenced on all seven counts of the indictment which was undoubtedly technically incorrect, (see *Prince v. United States*, 352 U.S. 322 (1957)), the sentences were to be served concurrently and therefore as the maximum sentence for one count in violation of § 2113(d) of 18 U.S.C., namely, twenty-five years, was not exceeded, the defendants are not harmed. See *Lewis v. United States*, 263 F.2d 265 (D.C.Cir. 1959), cert. denied 339 U.S. 959, *O'Malley v. United States*, 227 F.2d 332, 334 (1 Cir. 1955), cert. denied 350 U.S. 966 (1956), *Miller v. United States*, 147 F.2d 372, 374 (2 Cir. 1945).

Other points urged by the defendants have been considered by us but they are not deserving of specific comment. We have found no ground upon which to conclude that the defendants were deprived of a fair trial.

Judgments will be entered affirming the judgments of the district court.

in United States Court of Appeals for the First Circuit

On the same day, August 27, 1959, the following judgment was entered in each of the three cases:

Judgment

August 27, 1959

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decree as follows: The judgment of the District Court is affirmed:

By the Court:

[SEAL]

ROGER A. STINCHFIELD,

Clerk.

By (S) DANA H. GALLUP,

Chief Deputy Clerk.

Minute entries

Thereafter, on September 9, 1959, appellants filed a petition for rehearing which was denied by the Court on September 15, 1959.

Thereafter, on September 23, 1959, mandates issued and the original papers were returned to the District Court.

[787] [Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

No. —, October Term, 1959

ALVIN R. CAMPBELL, ET AL., PETITIONERS

v.

UNITED STATES

Order extending time to file petition for writ of certiorari

October 12, 1959

Upon consideration of the application of counsel for petitioner(s).

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including October 22, 1959.

Felix Frankfurter,

FELIX FRANKFURTER,

Associate Justice of the Supreme

Court of the United States.

Dated this 12th day of October 1959.

Supreme Court of the United States

No. 423, Misc., October Term, 1959

ALVIN R. CAMPBELL, ARNOLD S. CAMPBELL AND DONALD
LESTER, PETITIONERS

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT*Order granting motion for leave to proceed in forma pauperis
and granting petition for writ of certiorari*

March 7, 1960

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question No. 5 presented by the petition which reads as follows:

"Whether production of a statement which was read and signed by a government witness is excused after a complete foundation for it is made under 18 F.S.C. 3500 on the ground that the only document in the possession of the prosecutor is a summary by an F.B.I. Agent and not the statement signed by the witness without any showing as to what became of the original statement."

The case is transferred to the appellate docket as No. 766.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ. March 7, 1960.

LETTER NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 53

ALVIN R. CAMPBELL, ARNOLD S. CAMPBELL, and
DONALD LESTER,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 53

**ALVIN R. CAMPBELL, ARNOLD S. CAMPBELL, and
DONALD LESTER,**

Petitioners,

v.

UNITED STATES OF AMERICA.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

BRIEF FOR THE PETITIONERS

Opinion Below

The opinion of the Court of Appeals (R. 216-222) is reported at 269 F. 2d 435.

Jurisdiction

The judgments of the Court of Appeals were entered on August 27, 1959 (R. 223). Petition for rehearing was denied on September 15, 1959 (R. 223). The time for filing a writ of certiorari was extended to and including October 22, 1959, by order of Mr. Justice Frankfurter, dated October 12, 1959 (R. 224). The petition for a writ of certiorari was filed on October 22, 1959, and was granted on March 7, 1960 (R. 225), 362 U.S. 909. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

Question Presented

Whether production of a statement which was read and signed by a government witness is excused after a complete foundation for it is made under 18 U.S.C. 3500 on the ground that the only document in the possession of the prosecutor is a summary by an F.B.I. agent and not the statement signed by the witness without any showing as to what became of the original statement.

Statute Involved

The statute involved in this case is the so-called Jencks case Statute, 18 U.S.C., Section 3500. This statute is printed in its entirety in the Appendix, *infra*.

Statement

The petitioners were charged jointly in a seven count indictment with violations of the Bank Robbery Act, 18 U.S.C. 2113, Sections (a), (b) and (d). They were convicted by a jury and each was sentenced to various terms on each Count ranging up to twenty-five years, all to be served concurrently.

There are set forth here only sufficient relevant facts for a review of the particular question presented in the grant of the writ of certiorari.

One Dominic Staula was called as a government witness (R. 138)¹ and testified at some length to details of the robbery, identifications, and interviews with special agents of the F.B.I.

¹Page references are to those appearing at the bottom of each page of the Transcript of the Record in consecutive order.

The witness Staula was the only one out of more than fifty government witnesses who identified the petitioner, Donald Lester, except for one informer-accomplice witness, a Richard Gibson. Richard Gibson was himself a suspect at one point during the investigation of the robbery by the F.B.I. and told a story in Court that he had received some money out of the proceeds of the robbery. Staula stated that Lester "looks like" the man that had the gun on him (R. 145). The trial judge later perfected the identification into a positive one (R. 146). This was followed by a reiteration of the positive identification under further questioning by the United States Attorney (R. 146-147).

Mr. Staula described a man near the door of the bank as wearing a blue suit, soft hat, and dark glasses (R. 142-143) and identified that man as resembling the petitioner, Arnold Campbell (R. 145, 171). Every other of the many witnesses who identified the man in the blue suit testified that that man either was or resembled or looked like Alvin Campbell, and that is how the witness, Yates, testified (R. 104 and 109).

Mr. Staula stated in Court that he got a glimpse of a third man, other than customers and employees, in the bank that morning (R. 143).

During the cross-examination of Staula, he was questioned about his interviews with F.B.I. agents. He was asked if an F.B.I. agent wrote down what he said; if what was written down was read back to him; and if what was written down was essentially what he had just related to them. He answered all three questions in the affirmative (R. 199-200). Counsel then demanded Staula's statement under the provisions of the Jencks Statute, 18 U.S.C. 3500, and the Court ordered the government to produce it (R. 200).

Under questioning by the Court (R. 200), Staula said that what was read back to him was an accurate statement

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of what he told them. He thought he had to sign it (R. 201). At that point, it was announced that the government had no statement in its possession fitting the description of having been read, adopted and signed by Staula (R. 201-202). The Court asked if the "*United States*" has in its possession notes taken by an F.B.I. agent when Staula was interviewed (R. 203) and the U.S. Attorney stated, "I do not have them in *my* possession and I do not know whether they ever existed." (Emphasis added.)

Staula was called back to the stand on another day and shown the report of the F.B.I. agent (R. 205). The court then asked if that statement contained a substantially verbatim account of what he told the agent, and the witness said it was not (R. 205-206). The Court then excluded it and counsel then made a common law demand for that statement (R. 206). Then, counsel moved to strike the entire testimony of Staula for the failure of the government to produce the original document, which motion was denied by the court (R. 206-207). Counsel also noted that the "record is completely without explanation as to the original document" (R. 210). The United States Attorney stated that apparently counsel were "shifting position into a sphere which I was trying to get them to determine this morning what specific document they wanted. Now they say the original document is not explained" (R. 210). The F.B.I. agent's report of the Staula statement appears on R. 212-213.

During the earlier testimony of one Francis L. Yates, a similar situation arose over the statement taken from Mr. Yates by the F.B.I. The Court interrogated Mr. Yates (R. 44) and then ordered the statement produced (R. 45). The court then allowed the witness overnight to think over what happened (R. 48-50). Yates resumed the next day and was questioned by the court again and after much

colloquy (R. 58-68), the court asked the United States Attorney to turn over the statement (R. 68). The United States Attorney set forth his position concerning the difference between original notes and the reports of F.B.I. agents as follows (R. 65): "If a specific document is asked for and I don't have it and nobody has it, I don't think you or anybody else can require me to produce a nonexistent document." The court answered, "That's right." Finally, the judge told the jury he was giving counsel the right to have access to the F.B.I. report (R. 75).

Prior to the judge ordering the Yates statement produced, the United States Attorney claimed it did not come within the statute because he was "ruling on something (the mimeographed F.B.I. report) * * * the witness has never seen." The United States Attorney was attempting to distinguish to the Court between the handwritten notes of the F.B.I. agent and the mimeographed report or summary prepared by the F.B.I. agent which he had in his possession in the courtroom (R. 71-72).²

In many respects, it may be seen that the situations presented by the Yates statement and the Staula statement were similar except as to the court's decisions on each.

The court below affirmed this ruling by the district judge, stating that this point "does not warrant extended discussion" in view of *Palermo v. United States*, 360 U.S. 343 (R. 216-217). The Court of Appeals took the position that since the F.B.I. investigator's summary which was shown to the court *in camera* did not meet the precise definition of a statement within any of the subsections of 18 U.S.C.

² The court then said he felt that from an evidential viewpoint, as distinguished from any question of law, it would do a great disservice to the jury not to let them know what was in the statement. His experience had proven to him that the F.B.I. reports would not contain any exaggeration:

3500, then there was no error in refusing to order the government to produce it.

Summary of Argument

The rulings of the trial judge and the court below are based exclusively on the question of whether or not the summary produced by the prosecutor met the definition of a "statement" as set forth in the statute and explained in *Palermo*.¹ This ignores the fact that the witness Staula testified to a complete foundation for the production of his statement to the F.B.I., which the prosecutor said he did not have in his possession. Even though the summary produced did not meet the statutory definition of a statement, the failure to produce the original notes (which did satisfy the statute) cannot be without consequence. The trial judge denied a defense motion to strike Staula's testimony from the record for the failure to produce the original notes. The defense was then denied access to the summary under a common law demand, which would have brought it under the law of the *Jencks*³ case itself.

Since the Act's major concern is to limit and to regulate defense access to government papers and not to eliminate all such access, the decision of the court below could effectively contravene that purpose by ending all discovery. The decision was not only a misinterpretation of *Palermo*; it was primarily a misapplication of it. In every investigative situation, a government agent could return to his office, prepare a summary of the statement of a government witness, and then destroy the statement itself or the sub-

³ *Jencks v. United States*, 353 U.S. 657.

¹ See *The Jencks Legislation: Problems in Prospect*, 67 *Yale L.J.* 674, 688 (1958); also see *Palermo v. United States*, 360 U.S. 343, 362-363.

stantially verbatim notes adopted or signed by the witness. Good faith or bad faith in the destruction of the statement or notes is completely immaterial. The so-called Jencks Act cannot be used as an instrumentality to end all discovery. This would violate the legislative intent in enacting the statute as well as the Sixth Amendment. It should also be borne in mind that due process requirements demand a defendant receive a fair trial.

The mandate of Subsection (d) of the Act leaves the court with no discretion if the government elects not to comply with an order to produce, and just as clearly, the court must order that the government produce a statement when a complete foundation for it is made under the statute. Of course, the court can delete immaterial portions, etc., but it cannot refuse to order production of the statement, deny a motion to strike, and refuse then to order an agent's summary produced. Neither the government nor the trial judge can force a defendant to pick which particular document he will demand. He is entitled to any and all statements meeting statutory requirements.

The doctrine of harmless error cannot apply to this case since the original statement was never produced, was not preserved for the record, and therefore cannot be reviewed by this Court.⁵ As to the summary which was preserved and reproduced (R. 212), the defense never had access to it during the trial nor to any of the information contained in it, as was the situation in *Rosenberg*.

To allow the decision of the court below to stand would be tantamount to ending all discovery of such statements and would bring about shockingly unfair consequences. Such a result is undesirable, unfair and patently improper.

⁵ See *Holmes v. United States*, 271 F. 2d 635, 638; *Rosenberg v. United States*, 360 U.S. 367, 371, 375-376.

ARGUMENT

I.

The Failure of the Government to Produce Staula's Statement After a Complete Foundation Had Been Laid—

During the cross-examination of the witness, Staula, he admitted giving a statement to an F.B.I. agent which was written down and read back to him in substantially the same language he used. He thought he had to sign the statement. The defense then demanded production of the statement under 18 U.S.C. 3500. The court at first ordered it produced (R. 200). The government prosecutors then informed the court that they did not have such statement or notes in their possession and did not know "if they ever existed" (R. 201-202, 203). Then, without cancelling or withdrawing the order to produce (meaning the statement taken at the time of the interview), the court denied the defense access to the summary of the statement and denied a motion to strike Staula's testimony for failure to produce the original notes. The court left his original order to produce in a state of suspended animation. The reasons for this are quite obvious. He was uncertain because first, a complete foundation was laid for the production of the statement, and it cannot be denied, from the testimony of the witness, that the statement once existed and once was in the possession of the United States. Subsection (b) of the statute says that after a witness called by the Government testifies on direct examination, the court, on motion of the defendant, *shall order* the production of any statement as defined by the Act with certain exceptions not here material. Second, the prosecutor then said he did not have the statutory statement in his possession and that what he did have did not meet statutory requirements.

The point that apparently confused the trial judge and which was totally ignored by the Court of Appeals was as to the meaning of the phrase "in the possession of the United States" as used in Subsection (b) of the statute. The prosecutor apparently tried to take the position that it means in the possession of the United States at the time of the demand after the witness has testified on direct examination. This interpretation is, of course, absurd, because it would only serve to render the statute useless. The prosecutor stated, and was quoted in the Government's Brief in opposition to the granting of this writ, that he was trying to get them to determine "what specific document they wanted" (R. 210). If that were permitted and the defense demands the original notes, the government says it does not have them in its possession; if the defense asks for the summary, the government answers that the summary does not come within the statute. The Statute gives neither the court nor the government any right whatsoever to force the defendant to play a game of Russian roulette with the government files and make a guess as to what particular statement or document he wants. In the case at bar, the statement which had to be produced was the one coming within the definition of the statute and proven to have existed and to have been in the possession of the government by the cross-examination of Mr. Staula.

The only way that phrase can be interpreted in order to carry out the legislative intent is to hold that it means in the possession of the United States at any time. Clearly, there is a presumption against the enactment of a useless statute, and the so-called Jencks statute would be useless if upon a demand for production, the government could be allowed to state that it does not have in its possession at that time any statement, notes, or document which would satisfy the statutory requirements for production.

The approach taken by the Court of Appeals to this problem was to take the naked principle of *Palermo* out of context and apply it in its entirety to a completely different factual situation. This leads to a procedure for the ending of all such discovery since this Court stated in *Palermo* that the statutory procedures are exclusive. By disposing of the original notes or statements which come within the statute in some manner or other and for any reason whatever,⁶ the Government could avoid all future discovery and still not run the risk of losing that witness' testimony through a defense motion to strike. Such a procedure was not intended by the Congress and cannot be read into the *Palermo* decision. The facts of the *Palermo* case are clearly distinguishable from the facts of the instant cases. Such an unintended, undesirable and unwanted result is abhorrent to all principles of fair play in the administration of criminal justice.

As to the statement itself, it is impossible to know what was contained in it nor what impeachment material it contained since neither the defense, the trial judge, the Court of Appeals, nor this Court has ever seen it.⁷ However, from the inferences to be drawn from the agent's summary of Staula's statement (R. 212), there must have been tremendous impeachment material in his statement. In the F.B.I. summary, it is stated that Staula could not identify the man in chino pants although he positively identified that man as Donald Lester at the trial. The summary also states he looked at another man in a blue suit "for a short period

⁶ This does not of necessity imply bad faith to the Government as argued by the Government in its Brief in Opposition to the grant of certiorari (P. 10).

⁷ In its Brief in opposition to the granting of this writ, the Government states that the original notes had been destroyed (P. 10). It should be noted, however, that the record itself is completely without explanation as to the statement.

of time" and at the trial, he testified that man resembled Arnold Campbell.* It is also stated in the summary that he did not observe a third man in the bank although he testified at the trial that he did observe "a third man" in the bank (R. 143).

It has been shown, therefore, that there was error which pertained to all the petitioners. In its Brief in Opposition to the granting of Certiorari, the Government argues that "if there were error in the ruling it would be available only to petitioner Lester" and states that Staula's testimony only affected Lester. This is erroneous in several respects, as pointed out above, especially where the Courts have never seen the original statement. However, it must be pointed out that his statement might have contained matter which he *did not* testify to on direct examination but which was material to his entire testimony concerning a robbery and identifications. Clearly, omissions may very well supply impeachment material for defense counsel. A witness might well be asked why he neglected to say certain things on direct testimony as well as why he said something else on direct testimony.

As stated in *Rosenberg v. United States*, 360 U.S. 367, 371, "An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled. . . ." The doctrine of harmless error as to any or all of the petitioners is inapplicable since, as stated above, the statement to which the defense was entitled has not been preserved in the record and the defense never has had whatever information it contained. In view of its destruction, there is no way to determine exactly what it contained.

* Almost all other government witnesses identified the man in the blue suit as either being or resembling Alvin Campbell.

In summary, production of the Staula statement was not excused after a complete foundation under the statute had been laid on the ground that the prosecutor did not have it in his possession and where the only document in his possession was a summary which did not meet the statutory definition of a "statement."

II.

The Defense Motion to Strike for Failure to Produce the Original Statement—

Under the provisions of subsection (d) of the Act, if the United States elects not to comply with an order to produce, the court shall strike from the record the testimony of the witness. The statute does not specifically require a motion by the defendant. Apparently, the court should take such action *sua sponte*. In any event, the court did neither in this case. The question arises, therefore, as to what constitutes an election not to comply.

Petitioners submit that putting a statement out of the reach of a court order by destruction or any other means constitutes at the least the equivalent of an election not to comply. In the present cases, the judge made an order to produce and then asked the prosecutor to inquire of the F.B.I. agent as to the statement (R. 203). The prosecutors informed the judge they did not have the statement in their possession, whereupon the court announced he would give the matter further consideration. Upon resuming (R. 204), the court acted only on the basis of the agent's summary and no longer considered the issue of the original notes (R. 204-206).

Petitioners contend that under the provisions of subsection (d) and in the circumstances herein presented, it was obligatory upon the trial judge to strike the testimony of the witness Staula from the record.

III.

The F.B.I. Agent's Summary of the Staula Statement and the Common Law Demand for the Production Thereof—

Petitioners contend that upon the refusal of the judge to strike the Staula testimony from the record, he should have ordered the production of the F.B.I. agent's summary. There are several grounds for this contention.

In the concurring opinion of *Palermo*, Mr. Justice Brennan cites, for authority that a judge has discretion to order a statement outside the statute to be produced, an example of a person interrogated at length who says he has no knowledge of the incident and then later testifies in great detail as a government witness about the defendant's alleged criminal conduct. The agent's summary merely stating the witness had no knowledge would be admissible in the discretion of the court under the ~~view~~ expressed.

In the present cases, the trial judge said, "If he refuses (the common law demand), I have no power to order it" (R. 207). Obviously, if trial courts have certain discretionary powers outside the statute, then the judge's statement as to lack of power is erroneous.

The investigative report in this case contains matter quite similar to the example cited in the concurring opinion of *Palermo*:

"Mr. Staula went on to state that he only observed the man standing in the center of the lobby for an instant and could give no further description of him because ~~he turned toward the front of the bank and~~ observed another man standing there holding a gun" (R. 212).

"Mr. Staula stated he did not observe a third man in the bank . . ." (R. 213).

At the trial, Mr. Staula identified the defendant, Donald Lester, as the first man who held the gun on him (R. 146-147) and testified he did see a third man in the bank that day (R. 143). This presents almost exactly the situation which is presented as an example to show the necessity of allowing the trial judge to exercise discretion in certain instances which come outside the strict bounds of the statute.

Reverting to the petitioners' contention that the failure to produce a statement proven to have been in existence at one time and coming within the definitions of the statute cannot be without consequence, the F.B.I. agent's summary should have been ordered produced under the secondary evidence rule. See *United States v. Waidman*, 159 F. Supp. 747, 749, D.C.N.J. (1958). This is not entirely without some support within the statute itself.

The title to the "Jencks" statute and the legislative history all incorporate the word "report." The word "report" also appears in subsection (a) of the statute and then does not appear again within the body of the statute. The title to an act may be resorted to as an aid in its interpretation. *F.T.C. v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-389.

The judicial construction of a statute must be made in the light of the common law and any previous statutes on the subject. If a statute requires construction, and the "Jencks" statute does, then it should not be given an absolutely literal meaning especially in view of the fact that as a statute dealing with the trial of criminal cases, it should be liberally construed.*

* Cf. *Yates v. United States*, 354 U.S. 298, 304-305. A statute should be liberally construed if it is humane in its scope. 50 Am. Jur., Statutes, 420, Sec. 396. See *F. T. C. v. Mandel Brothers, Inc.*, 359 U.S. 385, 389; *Black v. Magnolia Liquor Co.*, 355 U.S. 24, 26.

"Accordingly, every statute which is properly the subject of judicial construction should receive such interpretation as will not conflict with general principles, but, to the contrary, which will make it harmonize with the pre-existing body of law."

50 Am. Jur., Statutes, 333, Sec. 340

The fact that a statute contains a partial codification of a particular rule or principle of the common law does not necessarily abrogate the remainder of the common law rule. See 50 Am. Jur., Statutes, 340, Sec. 346. Obviously, an interpretation of this Statute is necessary if the courts are to prevent the ending of all discovery of a witness' prior statements by a device perfected within the letter of the law. If the government itself creates a situation not covered by the statute, then it is necessary to revert to the common law for governing rules and principles.

In the present cases, after the original statement was lost or destroyed and after the judge refused to strike Staula's testimony, the situation was one coming within the purview of the *Jencks* case itself. That case was the latest decision dealing with the law of discovery of these statements prior to the enactment of the so-called "Jencks" statute. When counsel, therefore, made the common-law demand for the report by agent Toomey, it is the contention of the petitioners that it should have been produced under the principle of the "Jencks" case rather than excluded under the "Jencks" statute.

In view of the fact that there was no legislative intent to eliminate all discovery and the fact that the word "report" appears in the legislative history and the title and subsection (a) of the statute, there is a clear mandate that the common law be reverted to in a situation where the government has, as a practical matter, taken away the power

of the courts granted to it by the Statute. Take a situation where a trial judge demanded the original be produced, rather than as in the present cases where the trial judge was only interested in protecting the position of the government, it is inconceivable that such a judge would be entirely powerless to act if the original notes or statement had been destroyed.¹⁰

In the court below, the government argued that since such discovery is intended for impeachment purposes, it would be improper to allow a witness to be impeached by a statement not his own. However, it can also be argued that the investigative summary or report was based on the interview with the witness, and it is hard to imagine a situation where a government agent would prepare a report containing clear impeachment material (as in the present cases) which did not come from the witness in the first instance. Actually, the witness would have protection against anything contained in an agent's summary which the witness denies he stated. As stated in *Palermo*, "The statute governs the production of documents; it does not purport to affect or modify the rules of evidence regarding admissibility and use of statements once produced." The same is true of statements produced under common law rules.

The petitioners submit that it was not the intent of the Congress to insulate a witness who has already testified on direct examination from being impeached in order to help secure a conviction. As spelled out in the *Jencks* case, that would not satisfy the requirements of fair play and justice.

¹⁰ See footnote 2, *supra*, concerning the trial judge's comments about the Yates statement which was produced to the defense. Obviously, in view of what the Staula summary contained, the judge no longer felt the same way about the Staula summary as he did about the Yates summary. His positions in each are exactly opposite.

It was not necessary to protect Staula's identity after his direct testimony; no problems of national security were involved; and Staula was neither an informer-type witness nor a person with any knowledge about government informers or investigative procedures.¹¹ The conclusion is therefore inescapable that there was utterly no reason, after his direct testimony, for not ordering the report to be produced (after it was stated that the originals were not available).

On the other hand, if this Honorable Court should decide there cannot any longer be any common law remaining and that all situations must come within the statute, then the petitioners respectfully refer this Court back to Part II of this Argument section concerning the Motion to Strike. It may perhaps be the better rule in any event to strike the testimony since a summary might inadvertently omit some phrase, sentence, or thought which would have been valuable to the defense either alone or in conjunction with other matters. The statute does specifically direct that the defense obtain any statement defined within the statute after certain conditions are met, and it was, after all, the F.B.I. that wanted the protection of this statute after the *Jencks* decision. Bearing all that in mind, it should be incumbent upon the government to preserve all original statements for possible use at a trial subject, of course, to the statute. In the alternative, the government should face the loss of the testimony of a witness or a mistrial or both.

It is submitted that the foregoing amply shows that the production of the original Staula statement was not excused merely because the government did not have it in its possession and further it shows that the non-production is

¹¹ See *Roviaro v. United States*, 353 U.S. 53, 59-61.

not without consequence. The answer to the "Question Presented" is therefore supplied in the negative. Any other solution would serve only to defeat the purposes of the statute.

Conclusion

It is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

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APPENDIX**TITLE 18 U.S. CODE, SECTION 3500****"Demands for Production of Statements and Reports of Witnesses**

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement

shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

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PETITION NOT PRINTED

No. 53

Office Supreme Court U.S.

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

ALVIN R. CAMPBELL, ARNOLD S. CAMPBELL AND DONALD
LESTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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BRIEF FOR THE UNITED STATES.

OPINION BELOW

The opinion of the court of appeals (R. 215-222) is reported at 269 F. 2d 688.

JURISDICTION

The judgments of the court of appeals were entered on August 27, 1949 (R. 223). Petitioners' motion for a rehearing was denied on September 15, 1959 (R. 223). On October 12, 1959, Mr. Justice Frankfurter extended the time for filing a petition for writ of certiorari to and including October 24, 1959 (R. 224). The petition for a writ of certiorari was filed on October 22, 1959, and granted on March 7, 1960, 362

U.S. 909 (R. 225). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Court limited the grant of certiorari to Question No. 5 presented by the petition, which reads as follows:

Whether production of a statement which was read and signed by a government witness is excused after a complete foundation for it is made under 18 U.S.C. 3500 on the ground that the only document in the possession of the prosecutor is a summary by an F.B.I. Agent and not the statement signed by the witness without any showing as to what became of the original statement.

In our view, this formulation of the question does not accurately reflect the record. The questions actually presented on this record are:

1. Whether, when notes of an interview (which the witness testified had been read back to him and might have been signed by him) were not in existence at the time of trial, the court should have directed that there be turned over to the defense a later report by the government agent which the witness testified was not a substantially verbatim account of what he had told the agent.

2. Whether the non-existence of the notes required that the testimony of the witness be stricken.

STATUTE INVOLVED

18 U.S.C. 3500 provides in pertinent part:

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order

the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *

* * * *

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

Petitioners were convicted after a jury trial in the United States District Court for the District of Massachusetts on a seven-count indictment which charged them with bank robbery and jeopardizing the lives of several persons in violation of 18 U.S.C. 2113. Each was sentenced to imprisonment for twenty years on count 1, ten years on count 2, and twenty-five years on

each of the remaining counts, the sentences to be concurrent. The court of appeals affirmed (R. 215-222). The evidence pertaining to the question upon which certiorari was granted may be summarized as follows:

1. *The testimony of the witness Staula.*

The government witness referred to in the question as to which certiorari was granted was one Dominic Staula, owner and operator of a plumbing and heating business, and a depositor in the bank in question. His testimony was significant for his identification of petitioner Lester as one of three men who on the morning of July 18, 1957, entered and robbed the Canton, Massachusetts, branch of the Norfolk County Trust Company, a member of the Federal Reserve System, and the deposits of which were insured by the Federal Deposit Insurance Corporation. The robbers were armed with revolvers and jeopardized the lives of several employees and customers of the bank. After taking possession of bank funds estimated to be \$31,618, they locked all persons present in the bank vault and made their escape.

Witness Staula had arrived at the bank that morning in order to make a deposit. He went to a desk, where he prepared a deposit slip, and then walked over to one of the cages, which at the moment was empty. While he was waiting for the teller to return, he heard a voice beside him telling him to get over against the wall. Staula turned and looked into the muzzle of a gun. The man said, "Get over against the wall, or we might have to kill somebody." Staula testified the man was about six feet tall and that all he noticed was his shirt—a white one with

short sleeves. Staula raised his hands and complied (R. 138-139, 141).

While Staula was standing over against the wall with his hands raised, another man standing behind him would direct anybody coming in the door to line up with the others against the wall. Once or twice Staula got a glimpse of this second man from the corner of his eye. He had on a blue suit and a soft hat and was wearing dark glasses. He seemed to be taller than Staula (R. 140, 142-143). He knew there was a third man because he "could see one from the side view and he was talking to another fellow behind the cages which was not the one standing behind me." (R. 140). He got a glimpse of the third man when they were emptying money in a paper bag (R. 143).

Staula was asked to step down from the witness stand and to point out any person in the court room (other than an employee or customer of the bank) whom he saw on that occasion. Staula stated that petitioner Lester looked like the man who had the gun and told him to go over against the wall (R. 143-146). He was asked (R. 145):

The Court: Well, the question is whether or not he is the man. Is he the man?

The Witness: Do I have to answer that?

Q. The Court has asked the question, sir.

The Court: Does anyone object to that question?

Mr. Koen [Assistant United States Attorney]: I don't object to the question.

Mr. O'Donnell [defense counsel]: I object to it.

Mr. Koen: Then I will ask the question, sir.

Q. Is that the man, sir?

The Court: Giving your best memory.

The Witness: He looks like the man.

Staula was then asked if there was anyone else in the court room who was present in the bank, and who was not an employee or customer of the bank. Staula responded that he could not be sure, but that Arnold Campbell resembled the man in the blue suit (R. 145). When the witness' attention was again directed to Lester, the latter protested. Staula stated that this was the man he had referred to as ordering him over against the wall (R. 146-147).

On cross examination, Staula testified that he had looked at the man who gave the order (whom he had identified as Lester) for a matter of seconds (R. 157-158). His glance at the second man in the blue suit was only a side glance which was very short (R. 158-159). He testified on cross-examination that, the day after the robbery, he went with Boston police to the vicinity of a gas station where he was asked to observe a helper. He told the police that the man had a slight resemblance to one of the robbers. This man at the gas station was not the man who had the gun (R. 168-190). At the gas station, Staula was shown a number of pictures and he picked out the picture of Lester (R. 181, 189). No F.B.I. agent was present at this time (R. 168, 193). When asked whether, before coming to court, he had ever told anyone he could make a positive identification, Staula said he had done so, to the grand jury (R. 178).

2. *Petitioners' request for statements.*

On cross examination, Staula was asked about an interview with F.B.I. agents after the robbery took place. He remembered that there were at least two agents, but did not remember their names; the interview took place at the Canton police headquarters about noontime (R. 179-180).¹ He was then asked (R. 180):

XQ. And at that time, sir, whether or not you had occasion to sign any statements? A. The only thing I signed was a piece of paper saying I was in the bank. I didn't sign anything, I just——

XQ. All right, you didn't sign it.

Staula testified that this was his only interview with any F.B.I. agents and that he had not related his story to anybody else (R. 180-181). Following this, he was extensively cross examined relating to his identification of Lester's picture at the time of his visit to the gas station with the police but without the F.B.I. (R. 181-199, see *supra*, p. 6). Without any further testimony concerning the giving of a statement, defense counsel demanded the production of the Staula "statement". The following ensued (R. 199):

Mr. Louison [defense counsel]: Your Honor, at this time we should like to request under the statute Public Law 85-269 of the 85th Congress, the statement of this man.

The Court: I am denying it because you have laid no foundation for it as you did the last

¹ He later said he met the F.B.I. the day he went to the gas station with the police (R. 193).

time;² this man said nothing was ever read back to him, so I am denying it and your rights are saved.

The following cross examination then took place:

XQ. Now, Mr. Witness, when you said you had a conversation with the FBI some time less than a week after July 18, 1957, did they write down what you had to say to them?

The Court: If you know.

The Witness: Yes.

XQ. And did they read it back to you, sir?

A. Yes.

XQ. And did they ask you if that was essentially what you had just related to them? A. Yes.

XQ. And did you tell them yes? A. Yes.

XQ. And you adopted that as your—?

Mr. Koen [Assistant United States Attorney]: I pray your Honor's judgment.

Mr. O'Donnell [defense counsel]: All right, I will strike that. Now, we move again, your Honor, under the—

The Court: I will order it produced. There is a foundation laid for it.

A conference then took place at the bench (R. 200):

The Court: Will you come up here, Mr. Witness?

(The Witness complied.)

The Court: Now, Mr. Witness, you testified here on cross examination that you talked to

² The court was obviously referring to F.B.I. reports concerning interviews with the witness Yates which were turned over to the defense when Yates said they were substantially what he had told the agent (R. 76-77, 92-105).

the FBI Agent and that he asked you questions, as I remember it, and that you didn't know what he had written down because it was not read back to you. Didn't you testify that way?

The Witness: I didn't remember. Since then I have recollected. He didn't actually ask me questions. I mean, at first I told him the story, and then when I got through he asked me a few questions.

The Court: Well, did he read it back to you?

The Witness: I believe he did.

The Court: What is your best memory of it?

The Witness: I am pretty sure he did.

The Court: Is your memory such as to enable you to say that what was read back to you was an accurate statement of what you told him?

The Witness: Yes.

In the colloquy which followed, government counsel stated that the witness could not have adopted the document they had in their possession because it was not in existence at the time he was being questioned. The court said that it would permit the witness to do what the other witness had done (R. 201), referring to the procedure whereby the witness Yates was shown an F.B.I. report which he said was substantially what he had related to the agent, following which that report was admitted and made the basis of cross examination (R. 76-77, 92-105). At this juncture the witness interrupted (R. 201-202):

The Witness: If you will excuse me, I am trying to rack my brain to think about what happened. I think they wrote down what I said, and then I think they gave it back to me to read over, to make sure that it was right.

And I think I had to sign it. Now, I am not sure. I couldn't remember before—

The Court: And he said it was read back to him. So if that is a transcript—

Mr. Hubley [Assistant United States Attorney]: It isn't. It is a report by an FBI Agent, which is a summary of the result of the interview. It is his interpretation of what happened.

The Court: Have you got in your possession any statement that was copied by an FBI Agent, which in any way would reflect a statement that this witness made and which he substantially adopted as the statement?

Mr. Hubley: No, your Honor, we don't.

The court then asked for and received the F.B.I. report of Special Agent John F. Toomey (set forth at R. 212-213) which the witness was requested to read. Rejecting the government's contention that the investigational report was not producible under any circumstances, the judge said that he was going to ask Staula to read it and, if the witness said it was substantially what he had said, he was going to permit the report to be offered (R. 202-203; see also R. 209-210).

Staula was later³ placed on the stand and asked

³In the interim there was a conference in chambers (see R. 211), which was transcribed, but which was not in the record before the court of appeals: We have filed the transcript with the Clerk (it is referred to in this brief as "Tr."). Government counsel stated several times that the original notes by the F.B.I. agent were no longer in existence and that there never had been a written statement by this witness (Tr. 1805, 1811, 1818-1820). Petitioners' counsel expressed the opinion that the agent should be examined (Tr. 1832) and the court

by the court to read the F.B.I. report. When asked whether he had previously seen the document, the witness said "No" (R. 205). When asked whether it was substantially verbatim what he had told the agent, the witness answered, "No, it is not." (R. 206). The court said he would exclude the report. The following colloquy took place (R. 206-207):

The Court: Now you want to make an objection?

Mr. Louison: Yes, for the failure to produce the original document without which this witness answered questions, we move to strike this witness' entire testimony from the record.

The Court: Well, I'll deny that.

Mr. Louison: Objection.

The Court: That's right, that's all right.

Mr. Louison: And we make a common law demand for that document at this time.

The Court: All right.

Mr. Koen: For what document?

Mr. Louison: That document.

Mr. O'Donnell: That the witness just read allegedly.

Mr. Koen: And I refuse.

The Court: If he refuses, I have no power to order it.

Mr. Koen: I refuse the common law demand.

The Court: All right. So there we have it.

The United States Attorney stated that "in refusing to accede to the common law demand made by the defendants, it is the position of the Government that,

pointed out that the government could not call the F.B.I. agents if they could not give admissible evidence, but that the defense had the names (Tr. 1836).

in view of the witness' answer to the Court's question, this document is not a document which properly can be used to impeach the witness because the witness said it is not a verbatim copy of the statement that he made" (R. 207).

The court then asked the witness if he meant that the document did not include the matters which the witness had told the agent. The witness replied, "That's not written up just the way the story is," and said, "There are things in there turned around" (R. 207).

The district court sealed the document for the court of appeals.⁴ The case was submitted to the court of appeals before this Court's decision in *Palermo v. United States*, 360 U.S. 343, and in that court petitioners argued only that the F.B.I. report should have been turned over to them. On the basis of the *Palermo* decision the court of appeals held that there was no error in failing to turn over the F.B.I. report since it was not a statement of the witness as defined in 18 U.S.C. 3500(e).

SUMMARY OF ARGUMENT

The original notes of the F.B.I. agent's interview with the witness Staula had been destroyed after preparation of the agent's report, in accordance with the usual practice—as the trial judge fully recognized. No bad faith on the part of the government was asserted by petitioners or found by the court. Petition-

⁴ It was apparently opened during the course of appellate proceedings and is printed in the record before this Court (R. 212-213).

ers' concern then turned to the agent's report. This was produced by the government to the court *in camera*. The judge examined it, and out of the jury's presence asked Staula (who had not previously seen the report) whether he adopted or accepted it. On the latter's rejection of the report as an accurate résumé of his statement to the agent, the court refused to turn over the report to the defense. The court also refused to strike Staula's testimony. These rulings were correct in the circumstances of this case.

I

The court properly rejected petitioners' demand that it turn over to the defense the F.B.I. agent's report, since Staula testified that the report was not a substantially verbatim account of what he had told the agent, was "not written up just the way the story is", and "[t]here are things in there turned around" (R. 205-206, 207). In these circumstances, the report did not fulfill the requisites of 18 U.S.C. 3500(e)(1) or of 18 U.S.C. 3500(e)(2), and was therefore not producible to the defense, either under the statute or otherwise. *Palermo v. United States*, 360 U.S. 343.

The mandatory provisions of the Jencks Act cannot be overruled, as petitioners attempt to do, by the claim that the report is now the best available evidence of the agent's handwritten notes which would have been producible under the statute if they were available at the trial. In addition to the serious question in this record as to the producibility of the notes (if they had been preserved), there is the crucial fact that the petitioners themselves failed to produce the best evidence

of what Staula told the agent—as they could have done by calling the agent (who was known and available to them). Their refusal to do so bars, at the outset, their effort to avoid the provisions of 18 U.S.C. 3500.

It is also important to note that the trial judge—who examined the agent's report and knew from his own knowledge, as well as from Staula's testimony and statements at the trial, that there were some discrepancies between the report and the witness' trial evidence—could have himself questioned Staula further or called the agent, if the judge had been disturbed about the differences. Trial judges, who in our system are the impartial masters of the trial, have this kind of authority to protect a defendant and insure truthful testimony—under 18 U.S.C. 3500 and the court's general powers—so long as they do not hand over a non-producible statement to the defense in violation of Section 3500. But in this case the judge did not deem it necessary to take such steps; and there is no reason to question his judgment since the so-called inconsistencies are easily explainable on grounds not going to the significant issues in the trial. Petitioners dwell, particularly, on the fact that the report does not indicate that Staula identified petitioner Lester in the F.B.I. interview, while he did so at the trial. The explanation is simply that Staula was not shown a picture of Lester, which he then identified as one of the robbers, until *after* his interview with the F.B.I. when local police interviewed him further; F.B.I. agents were not present at this identification. In these circum-

stances, the F.B.I. report had little bearing on the critical aspect of Staula's testimony, and it is hardly surprising that the report did not refer to or suggest any identification of Lester.

II

The fact that the F.B.I. notes of the interview with Staula were not kept would not require the striking of Staula's trial testimony under 18 U.S.C. 3500. When Section 3500(b) refers to a producible statement "in the possession of the United States", it obviously means in the possession of the government at the time production is called for, unless perhaps destruction or loss of a pre-existing document is due to bad faith. Here, there is no such suggestion, and, as we have pointed out, petitioners did not call the agent, either to inquire into bad faith or to discuss what actually transpired at the interview with Staula. Without utilizing that available avenue (at the least), petitioners are in no position to call for imposition of the drastic sanction of striking testimony which Section 3500 imposes only for failure to obey an order of the court to hand over a producible statement.

III

In any event, error with respect to the court's rulings on the F.B.I. report would constitute reversible error only as to petitioner Lester. The only

¹ We do not agree that on this record petitioners have shown that the agent's notes constituted a producible statement under 18 U.S.C. 3500.

significant aspect of Staula's testimony incriminated Lester alone.

ARGUMENT

INTRODUCTION

The situation which confronted the trial judge in relation to petitioner's demand for production of the statement of the witness Staula was this:

1. The original notes of the F.B.I. agent's interview with Staula, which the witness thought had been read back to him and might have been signed by him, had been destroyed and were not in existence at the time of trial.^a There was, as the court observed in chambers (Tr. 1836), nothing unusual about the fact that the notes were destroyed after the agent's report was made. As pointed out by the government in *Needelman v. United States*, 362 U.S. 600, the personal handwritten notations of the agent—which are one of the bases of his formal report for his colleagues, superiors, and the files—are subject to all the variations attendant on a personal means of recollection and do not normally furnish a firm basis for consideration of the facts by others in the course of the investigation of a case. It is the report, rather than the agent's own notes, which is customarily passed on to others. For this reason, although such notes are sometimes kept by the agent, they are more often destroyed after his in-

^a While this is not made specific in relation to Staula in the record as printed, the court accepted the assurances of government counsel to that effect in the conference in chambers (Tr. 1805, 1811, 1816, 1818, 1836), and petitioners do not suggest that this was not the fact. (And see R. 65, where the United States Attorney stated that the F.B.I. did not have the notes of the interview with the witness Yates.)

vestigative report has been prepared. It would be most difficult, if not physically impossible, for the government to keep for years all the personal notes of its various agents, as well as all reports.⁷

In particular, in relation to the interview with Staula, there was no reason why an F.B.I. agent should have deemed his own notes worthy of being kept for subsequent trial purposes. Staula's interview with the F.B.I. was at noon, and therefore before Staula identified petitioner Lester's picture to the police (not the F.B.I.) at the gas station in the afternoon. From the F.B.I. interview, before the pictures were shown to Staula, the information gathered which could prove useful for future investigation was simply Staula's description of the man in the blue suit (the man whom Staula at the trial could identify only to the extent of saying that Arnold Campbell resembled him). This is reflected in the space devoted to this description in the formal report subsequently made by the F.B.I. agent. Staula's role as a potential witness became truly significant and assumed importance only when he identified Lester, an event which occurred after the F.B.I. interview and was made to persons other than the F.B.I.

⁷ The interview here occurred in July 1957, very shortly after the decision of this Court in *Jencks v. United States*, 353 U.S. 657, and before enactment of 18 U.S.C. 3500, so that procedures had still not crystallized. Every effort is being made by the F.B.I. to comply with the statute and to get statements or reports in a form that would render them producible under 18 U.S.C. 3500. It is, however, not deemed feasible to preserve all personal notes taken by the agents.

2. The judge had first ruled that, since the witness thought the notes had been read back to him and he might have signed them, the court would turn them over to the defense if they were available (R. 209). When the notes were shown not to be available, the judge endeavored to deal with the situation in a practical way by discovering whether the witness would adopt the report of the F.B.I. agent (Tr. 1820, 1830-1, 1832; R. 209-210) which the government produced to the court *in camera*. The witness, however, read the report (which he had not previously seen) and stated that it was not his and was not substantially verbatim what he had told the F.B.I. agent. Under those circumstances (as we discuss in more detail, *infra*, Point I), the judge properly ruled that he could not turn over the report to be used as a basis for cross-examination of the witness. 18 U.S.C. 3500; *Palermo v. United States*, 360 U.S. 343.

3. Petitioners' counsel then requested the court to strike Staula's testimony because the agent's original notes could not be produced, and because the F.B.I. summary, which was available, did not constitute a proper basis for cross-examination of the witness. We show in Point II, *infra*, that the court's refusal to strike the testimony was wholly correct. And in Point III, we show that, in any event, error with respect to the report of the interview with Staula would affect only petitioner Lester.

THE TRIAL COURT PROPERLY REFUSED TO TURN OVER THE F.B.I. AGENT'S REPORT OF THE INTERVIEW WITH THE WITNESS STAULA, WHICH STAULA TESTIFIED WAS NOT A SUBSTANTIALLY VERBATIM ACCOUNT OF WHAT HE HAD TOLD THE AGENT

1. As the court below held, this Court's decision in *Palermo v. United States*, 360 U.S. 343, establishes the correctness of the trial court's ruling that the agent's summary of his interview with Staula was not a statement producible under 18 U.S.C. 3500 (e), *supra*, pp. 2-3, as a basis for the impeachment of Staula. The summary was made after the interview with Staula; and Staula had never seen it until it was shown to him at the trial, out of the presence of the jury.

When Staula was called to the stand and questioned by the court, he testified that the report was not substantially verbatim what he had told the agent. He said it was "not written up just the way the story is" and "[t]here are things in there turned around" (R. 207). Since it had not been signed, adopted or approved by Staula, it could not qualify under Section 3500(e)(1), and since it was not substantially verbatim, it did not meet the requirements of Section 3500(e)(2). The court therefore properly refused to permit its use for the purpose of impeachment of Staula.*

* This is the same procedure which the court had initiated for determining whether the F.B.I. report relating to an interview with government witness Yates should be made avail-

2. Petitioners' suggestion to the trial court, and their argument in the court of appeals and here (Pet. Br. 13-18), that the F.B.I. report should have been produced under their "common-law" demand for the document, was answered by this Court's decision in *Palermo*, 360 U.S. 343, 349-350:

* * * The suggestion that the detailed statutory procedures restrict only the production of the type of statement described in subsection (e), leaving all other statements, *e.g.*, non-verbatim, non-contemporaneous records of oral statements, to be produced under pre-existing rules of procedure as if the statute had not been passed at all, flouts the whole history and purpose of the enactment. It would mock Congress to attribute to it an intention to surround the production of the carefully restricted and most trustworthy class of statements with detailed procedural safeguards, while allowing more dubious and less reliable documents a more favored legal status, free from safeguards in the tournament of trials. To state such a construction demonstrates its irrationality; the authoritative legislative history precludes its acceptance.

To be sure, the statute does not, in so many words, state that it is the exclusive, limiting means of compelling for cross-examination purposes the production of statements of a gov-

able to the defense. Petitioners protest that they do not understand why the Yates report was made available, but the Staula report was not. The answer is simply that Yates testified that the report was substantially correct (R. 62), thereby qualifying it under subsection (e)(2), whereas Staula said that the report relating to him was not.

ernment witness to an agent of the Government. But some things too clearly evince a legislative enactment to call for a redundancy of utterance. One of the most important motive forces behind the enactment of this legislation was the fear that an expansive reading of *Jencks* would compel the indiscriminating production of agent's summaries of interviews regardless of their character or completeness. Not only was it strongly feared that disclosure of memoranda containing the investigative agent's interpretations and impressions might reveal the inner workings of the investigative process and thereby injure the national interest, but it was felt to be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations. The committee reports of both Houses and the floor debates clearly manifest the intention to avoid these dangers by restricting production to those statements specifically defined in the bill. * * *

The wisdom of the Congressional decision to restrict production to documents fairly attributable to the witness is shown by one of the examples which petitioners offer as showing the value of the report for impeachment purposes. The report states that Mr. Staula said that "he did not *observe* a third man in the bank" (emphasis added). Staula's testimony at the trial was that he knew there was a third man because he heard the man in the blue suit conversing with a third man and that he obtained a glimpse of

the third man while the men were emptying money into bags. See the Statement, *supra*, p. 5. He gave no description of the third man and never attempted to identify him. The ambiguous word "observe" is the agent's word, and may have been used, from the point of view of an agent starting an investigation, to indicate that Staula could not be helpful in tracking down the third man since he had not really seen him sufficiently to "observe" him. But it would be unfair to the witness and engender confusion to hold Staula responsible for the agent's own wording which is subject to the interpretation which petitioners in fact seek to give it, that Staula did even glimpse the third man and was not at all sure that a third man was present (Pet. Br. 13).

3. Petitioners argue that, since Staula did testify that he thought the agent had read back the notes at the time of the interview and that he might have signed them, there was once in existence a statement which would have been producible under 18 U.S.C. 3500 (as the trial court had ruled)* and that therefore the report should have been turned over under the secondary evidence rule. It is far from clear

* If the agent's notes had truly been adopted or approved by Staula, or were a substantially verbatim recital of Staula's statement to the agent, they would have been producible as the communicated statement of a government witness (Staula) in the possession of the United States. See *United States v. Papworth*, 156 F. Supp. 842, 853-854 (N.D. Tex.), affirmed, 256 F. 2d 135 (C.A. 5), certiorari denied, 358 U.S. 854. This is to be sharply distinguished from the production of non-communicated notes of the agent to impeach the agent's own testimony (the situation involved in *Needelman v. United States*, 362 U.S. 600).

that there was ever a producible statement, since the recollection of the witness was most hazy and the F.B.I. agent (whose name was known to petitioner's counsel) was not called to state his memory of whether he had read the notes back to the witness or had him sign them (see *supra*, pp. 7-10, and *infra*, p. 26, fn. 11).

But, in any event, petitioners themselves failed to produce the best evidence. If they wished to prove precisely what Staula had told the agent, they could have called the agent and asked him. They knew that the report contained something different from Staula's testimony since Staula said it was not verbatim, was "turned around", and was "not written up just the way the story is" (*supra*, pp. 11, 12). They knew the agent's name and knew he was available. The judge indicated to them that they could call the agent, but that the government was under no obligation to do so since the agents could not give any admissible testimony on the case (Tr. 1832-1836). Having failed to call the agent, petitioners are hardly in a position to claim, on the basis of the secondary evidence rule, the right to a report which was not, on this record, the statement of the witness (or fairly attributable to him) in order to impeach him.

4. It is also important to emphasize that the F.B.I. agent's report was made available by the prosecution to the judge and to the witness Staula. The latter read it, while on the stand, and rejected its accuracy. Thus, the fact of inconsistency between the report and Staula's testimony at the trial was known to the court

and to the parties. If the judge, who had the report and read it (Tr. 1822, 1844-5; R. 206, 210), thought that this admitted inconsistency was significant enough to require further probing, he would have himself questioned Staula about the differences. In our view, the trial judge does have discretion to call for a summary report of this type and to use it to question the witness himself, or to call the agent to the stand if he deems that step appropriate, or to take such other action as appears necessary to test the witness—provided that he does not make the summary available to the defense counsel (a step which Congress has prohibited in 18 U.S.C. 3500). The judge is the impartial master of the trial; where necessary, he can protect the rights of the defendant against false or incomplete testimony and insure even-handed justice by such procedures, short of handing over the non-producible summary or report to the defense to use as it will (a procedure which Congress has itself determined would, on balance, be harmful to the public interest).

In this case, the trial judge did not deem it necessary to take these steps, and no reason appears to question his judgment. We have already referred (*supra*, pp. 21-22) to petitioners' notation of the fact that the report states that Staula did not "observe" the third man, and shown that this was not inconsistent with Staula's testimony at the trial. The other so-called inconsistency is also no really an inconsistency. Petitioners point to the fact that, according

to the report, Staula stated that he could not give a description of the first man with the gun other than that he was a Negro, wearing gray chino pants, standing in the center of the lobby and holding a gun, whereas at the trial Staula identified Lester as that man (Pet. Br. 10). But it is certainly not an unknown phenomenon that a person cannot articulate a description and yet can identify a person when he sees him or his picture. As we have pointed out (*supra*, p. 17), the significant fact with relation to Staula's testimony was that, *later* on the same day as the interview with the F.B.I., the day after the robbery, Staula did pick out Lester's picture from among a group of pictures. As to this, petitioners did engage in extensive cross-examination (R. 181, 190); and, as to this, the interview with the F.B.I. has no bearing because no F.B.I. man was present at the picture-showing, and, at the time of the earlier F.B.I. interview, Staula had not been shown the pictures (R. 193). In the context of the significant issues in this case, Staula's initial interview with the F.B.I., before he was shown any pictures, was not important, and it was not significant that the report differed somewhat from his testimony at the trial.¹⁰ There was thus no reason to subject him to examination on the basis of the report, particularly since he himself testified that it was not his statement.

¹⁰ The trial judge was quite aware that the important part of Staula's testimony at the trial was his identification of petitioner Lester (see T. 1820-1821).

II

THE FACT THAT THE NOTES OF THE INTERVIEW HAD NOT
BEEN KEPT WOULD NOT REQUIRE THE STRIKING OF THE
TESTIMONY OF THE WITNESS

Petitioners also argue that since, on the basis of Staula's testimony that the notes had been read back to him and might have been signed, there once was a document which the court had indicated it would order produced, the failure of the government to produce the notes at the trial, for whatever reason, was the equivalent of an election not to comply with an order of the court under 18 U.S.C. 3500(d). Hence, they assert that, under that section, the court was required to "strike from the record the testimony of the witness". As indicated *supra*, pp. 22-23, we do not concede that this record adequately shows that a producible statement was ever in existence,¹¹ but in any event the petitioners' claim has no merit.

1. The statute refers to any statement of the witness "in the possession of the United States", 18 U.S.C. 3500(b), and necessarily means in possession of the

¹¹ Staula's recollection was very unclear as to just what happened: his final testimony on the point shows this (R. 201):

If you will excuse me, I am trying to rack my brain to think about what happened. I think they wrote down what I said, and then I think they gave it back to me to read over, to make sure that it was right. And I think I had to sign it. Now, I am not sure. I couldn't remember before—

This is hardly the "complete foundation" for production of the notes which petitioners assert as the basis of their argument; and, as we have pointed out, they made no attempt to call the F.B.I. agent to discover more precisely what did happen.

United States at the time production is called for. A party cannot be called upon to produce that which he does not have. This self-evident proposition is well grounded in the law of discovery. *Societe Internationale v. Rogers*, 357 U.S. 197; *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 347; *Fisher v. United States Fidelity & Guaranty Co.*, 246 F. 2d 344 (C.A. 7); *Victor G. Bloede Co. v. Joseph Bancroft & Sons*, 110 Fed. 76 (C.C.D. Del.); *Despeaux v. Pennsylvania R. Co.*, 149 Fed. 798 (C.C. E.D. Pa.). If, for example a statement clearly producible under 18 U.S.C. 3500 was accidentally destroyed by fire, that would be no reason for not using the living testimony of the witness. Our system of trial rests on the assumption that the live testimony of a witness, under oath subject to cross-examination, is superior to an *ex parte* statement made not under oath. The *ex parte* statement may or may not be useful in cross-examination of the witness, for impeachment purposes, but the mere fact that it is not in existence does not mean that the testimony of the witness should not be received.

2. If a party willfully destroys evidence relating to a contested issue, he may be subject to a presumption that the evidence would have been unfavorable to his cause. Conceivably if a court found that a producible statement of a witness had been destroyed for improper motives, it could regard destruction as the equivalent of non-compliance with an order to produce under 18 U.S.C. 3500(d), and preclude the government from using the testimony of the witness whose statement had been so destroyed. But petitioners made no attempt to show any improper action by the

United States, or that the destruction of the notes was in bad faith. They did not even try to discover why the notes were not in existence. Before petitioners could seek to invoke the drastic remedy of keeping from the jury the relevant testimony of a witness who was before the jury and subject to cross-examination, on the basis of the fact that the notes of an interview with the witness were not in existence, it would be incumbent upon them to show that the non-existence of the notes was the result of bad faith on the part of the government. Petitioners made no such attempt, and the court quite clearly accepted the reasonable explanation that notes of this type are most frequently destroyed after the agent has drawn up his report (see *supra*, pp. 16-17).

3. Moreover, there would be no reason to strike the testimony of the witness since petitioners did not exhaust the remedies that were available to them to find out what had transpired at the interview. As pointed out *supra*, p. 23, they knew the name of the agent who had interviewed Staula and knew that he was available. There was thus no reason why, if they had deemed the matter of significance, they could not have endeavored to call the agent as a witness. They did not choose to do so. Whatever their reasons for not taking this course—whether it was because they realized that any differences would not be significant since Staula's identification of Lester came *after* the F.B.I. interview, or for some other reason—they could not justifiably attempt to hold the government to the penalty of striking testimony (imposed by the statute for failure to obey an order of the court), without

attempting to go as far as they could in attempting to find out what had transpired at the F.B.I. interview.

4. Finally, as we have also pointed out, *supra*, pp. 17, 24-25, the interview of the F.B.I. with Staula is of little significance in relation to Staula's identification of Lester since that identification came later when Staula picked out Lester's picture at a time when F.B.I. agents were not present. Accordingly, since the interview had no real bearing on the crucial part of Staula's testimony, there would be no reason to strike the testimony of Staula because the notes of the interview had been destroyed.

III

ANY ERROR IN RESPECT TO THE RULING ON THE F.B.I. AGENT'S REPORT OF THE INTERVIEW WITH STAULA WOULD CONSTITUTE REVERSIBLE ERROR ONLY AS TO LESTER

There was very little in Staula's testimony which incriminated the petitioners other than Lester. Staula thought that Arnold Campbell resembled the man in the blue snit (R. 145). However, this gave no weight to the case against this petitioner, since the other government witnesses identified this man as Alvin Campbell (Pet. Br. 11, fn. 8). Testimony which, on its face, was negligible thereby lost all its probative value; confusion in identification is always helpful to the defense. Staula did not attempt to identify the third man, of whom he only caught a glimpse (R. 143). The sole significance of the Staula testimony thus relates only to petitioner Lester, so that the

question here presented in no way affects the other petitioners.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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Attorneys.

SEPTEMBER 1960.

SUPREME COURT OF THE UNITED STATES

No. 53.—OCTOBER TERM, 1960.

Alvin R. Campbell, Arnold S. Campbell and Donald Lester, Petitioners. v. United States.	}	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.
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[January 23, 1961.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

After a government witness testifies on direct examination in a federal criminal prosecution the trial court is required, under the so-called Jencks Act,¹ on motion of the defendant, to order the United States to produce, for

¹ 18 U. S. C. § 3500. *Demands for production of statements and reports of witnesses.*

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised,

impeachment purposes, defined pretrial statements of the witness, or parts of such statements as determined under subsection (c), which relate to the subject matter of his trial testimony and are in the possession of the United States. The conviction of the petitioners in the District Court for the District of Massachusetts for bank robbery in violation of 18 U. S. C. § 2113 was sustained by the Court of Appeals for the First Circuit. 269 F. 2d 688. During the trial the court ordered the government to produce a document described on cross-examination by one

the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." Added by Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

of its witnesses in terms which satisfy the definition of a "statement" under the Act. The government denied having possession of such a document. It did, however, admit possession of an Interview Report of an interview of an FBI agent with that witness, but contended that this report fell outside the statute. The trial judge held an inquiry without the jury present, at the conclusion of which he refused to order the United States to deliver the Interview Report to the petitioners, and also denied their motion to strike the testimony of the witness. The procedure at that inquiry raises questions important in the administration of the Jencks Act, and we granted certiorari limited to the review of those questions. 362 U. S. 909.

The government witness was Dominic Staula, a depositor who was in the bank at the time of the robbery. On direct examination he identified the petitioner Lester as one of the robbers. When asked on cross-examination whether he made any statements to government agents before the trial, he said that an agent of the Federal Bureau of Investigation who interviewed him during the week following the robbery wrote down such a statement. His recollection of what occurred at the interview was not entirely clear,² but the trial judge ruled that he had made

² The pertinent parts of his testimony are as follows:

"XQ. Now, Mr. Witness, when you said you had a conversation with the FBI some time less than a week after July 18, 1957, did they write down what you had to say to them?

"The COURT: If you know.

"The WITNESS: Yes.

"XQ. And did they read it back to you, sir? A. Yes.

"XQ. And did they ask you if that was essentially what you had just related to them? A. Yes.

"XQ. And did you tell them yes? A. Yes.

"The COURT: I will order it produced. There is a foundation laid for it.

"The WITNESS: ... He didn't actually ask me questions. I

a statement satisfying the requirements of the Jencks Act and ordered the United States to produce it. The Assistant United States Attorney presenting the government's case stated that he had no such paper as the witness described. He stated further that the only document in the possession of the prosecution was not a "statement" within the statute, being a typed Interview Report³ of

mean, at first I told him the story, and then when I got through he asked me a few questions.

"The COURT: Well, did he read it back to you?"

"The WITNESS: I believe he did."

"The COURT: What is your best memory of it?"

"The WITNESS: I am pretty sure he did."

"The COURT: Is your memory such as to enable you to say that what was read back to you was an accurate statement of what you told him?"

"The WITNESS: Yes."

"The WITNESS: If you will excuse me, I am trying to rack my brain to think about what happened. I think they wrote down what I said, and then I think they gave it back to me to read over, to make sure that it was right. And I think I had to sign it. Now I am not sure. I couldn't remember before—"

³ The District Court sealed the Interview Report for the Court of Appeals. The Court of Appeals released it and it is in the record here. The full text is as follows:

"Federal Bureau of Investigation Interview Report

"Mr. Dominic Staula, home address 259 Island Street, Stoughton, Massachusetts, a customer at the victim bank, advised that he arrived at the Norfolk County Trust Company in Canton, Massachusetts, to transact some business at approximately 10:15 A. M., July 18, 1957. Mr. Staula stated that he was driving a truck and parked it beside the Canton Depot in the parking area located between the railroad depot and the bank. He stated that he noted nothing unusual when he entered this parking area nor did he notice anything unusual in walking from where he parked his vehicle to the bank.

"It was stated by Mr. Staula that he went to the teller's window which is served by Mr. Kennedy and while standing in line at this

FBI Special Agent Toomey prepared and transcribed after the interview at a time unknown to the Assistant. The Assistant refused to deliver the report to petitioners' counsel but delivered it to the judge for his inspection. To the court's question whether the government

window, but before being waited upon by Mr. Kennedy, he heard somebody state from behind him 'Over against the wall.'

"Mr. Staula stated that he looked around and observed a man whom he described as being a negro, wearing gray chino pants, standing in the center of the lobby and holding a gun. Staula stated that he immediately realized that the bank was being held up and at once took his deposits which consisted of cash and slid them into his side trouser pocket.

"Mr. Staula went on to state that he only observed the man standing in the center of the lobby for an instant and could give no further description of him because he turned toward the front of the bank and observed another man standing there holding a gun. Staula stated that he looked at this man for a short period of time and described him as follows:

"Property of FBI.—This report is loaned to you by the FBI, and neither it nor its contents are to be distributed outside the agency to which loaned."

Sex	Male.
Race	Negro.
Age	Approximately 30 years.
Height	5' 10".
Weight	165 pounds.
Complexion	Very dark.
Build	Slender.
Face	Round.
Clothing	Dark blue suit.
	Blue snap brim hat.
	White shirt.

"Mr. Staula stated that he did not observe a third man in the bank—

"It was stated by Mr. Staula that he did not know what type of gun was carried by these two individuals whom he observed but believed that they could have been 45 caliber automatics.

"Mr. Staula stated that after taking a look at the individual wear-

possessed "any statement which was copied by an FBI agent which in any way would reflect a statement that this witness made and which he substantially adopted as the statement," the Assistant replied "No, your Honor, we don't." To the further question whether "the United States [has] in its possession any notes that were taken down by the FBI agent at the time this witness was interviewed," the Assistant answered, "I do not have them in my possession and I do not know whether they ever existed."

The Jencks Act limits access by defendants to such government papers as fit the Act's definition of "statements" which relate to the subject matter as to which the witness has testified, *Palermo v. United States*, 360 U. S. 343. However, the statute requires that the judge *shall*, on motion of the defendant, after a witness called by the United States has testified on direct examination, order the United States, for impeachment purposes, to produce any such "statements." To that extent, as the legislative history makes clear, the Jencks Act "reaffirms" our

ing the blue suit he faced the wall as previously ordered and observed these individuals no further.

"He stated that after he stood with his face to the wall for approximately 10 minutes one of the robbers ordered him and the other people who were standing on either side of him to walk into the vault. He stated that he does not recall which of the robbers issued this order but that he did enter the vault as directed and observed these individuals no further.

"Mr. Staula stated that one of the robbers, closed the door of the vault he issued some order to the effect that the people locked inside should not leave and that they stayed there for 5 or 10 minutes until the vault door was opened by Sergeant Ruane of the Canton, Massachusetts, Police Department."

"Interview with Dominic Staula, File # 91-952, on July 19, 1957, at Canton, Massachusetts, by Special Agent John F. Toomey, Jr., bjp."

holding in *Jencks v. United States*, 353 U. S. 659, that the defendant on trial in a federal criminal prosecution is entitled, for impeachment purposes, to relevant and competent statements of a government witness in possession of the government touching the events or activities as to which the witness has testified at the trial. S. Rep. No. 981, 85th Cong., 1st Sess., p. 3. And see H. R. Rep. No. 700, 85th Cong., 1st Sess., pp. 3-4. The command of the statute is thus designed to further the fair and just administration of criminal justice, a goal of which the judiciary are the special guardians.

After an overnight recess the trial judge conducted an inquiry without the jury present to take testimony and hear argument of counsel. Plainly enough this was a proper, even a required, proceeding in the circumstances. Determination of the question whether the government should be ordered to produce government papers could not be made from a mere inspection of the Interview Report, but only with the help of extrinsic evidence. The situation was different from that governed by subsection (c), in which the government admits that a document in its possession is a "statement" but submits the paper for the judge's *in camera* inspection to delete matter which the government contends does not relate to the subject matter of the testimony of the witness. The situation was similar to that in *Palermo*, where the government also contended that a paper in its possession was not a "statement." We there approved the procedure of taking extrinsic testimony out of the presence of the jury to assist the judge in reaching his determination whether to order production of the paper. We said, p. 355, "It is a function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement."

In this case the aid of extrinsic evidence was required to answer the following questions bearing on the petitioner's motions:

Did Toomey write down what Staula told him at the interview? If so, did Toomey give Staula the paper "to read over to be sure it was right," and did Staula sign it?

Was the Interview Report the paper Staula described, or a copy of that paper? In either case, as the trial judge ruled, the Interview Report would be a producible "statement" under subsection (e) (1). "Statements" under that subsection are not limited to such as the witness has himself set down on paper. They include also a statement written down by another which the witness "signed or otherwise adopted or approved" as a statement "made by said witness." True, the report does not bear Staula's signature and the witness testified he "thought he signed" the original paper. However, if the paper was otherwise adopted or approved by the witness, his signature was not essential. See *Bergman v. United States*, 253 F. 2d 933, 935, note 1; *United States v. Tomaiolo*, 280 F. 2d 411, 413.

If the Interview Report was not the original or a copy of the paper Staula described, what became of the paper?

In any event, even if the Interview Report was not the original or a copy of the paper Staula described, had Staula read over and approved the Interview Report? In such case the report would be producible under subsection (e) (1) although not related to the paper Staula described. Or was the Interview Report a substantially verbatim recital of an oral statement which the agent had recorded contemporaneously? If extrinsic evidence established that the report would be producible under subsection (e) (2). *Palermo v. United States*, 351-352.

The obvious witness to call was Special Agent Toomey who, the parties agreed, was readily available. Defense counsel suggested that the agent be called "to explain where he got the . . . [Interview Report]," and also because "Mr. Toomey could easily say what he has done with the original writing." Defense counsel were not in a position also to appreciate the significance of Toomey's testimony to the possible producibility of the Interview Report itself. Consistently with our admonition in *Palermo*, 360 U. S., at 354, that "It would indeed defeat this design [to limit defense access to government papers] to hold that the defense may see statements in order to argue whether it should be allowed to see them," neither the government nor the judge permitted them to inspect it. From his own inspection, however, the judge was aware of the significance which Toomey's evidence might have on the judge's determination whether he should order the government to turn over the Interview Report to the defense. The Interview Report resembles the statement Staula described and the judge indicated that he would order its production if it was that statement or a copy of it, or although not the original or a copy, if Staula had read and approved it, or if it was a contemporaneously recorded substantially verbatim recital of Staula's oral statement. Nevertheless, the judge ruled that it was for the petitioners to subpoena Toomey as "their witness" if they believed his testimony would support their motions, and that he would not of his own motion summon Toomey to testify, or require the government to produce him. We think that this ruling was erroneous.

The inquiry being conducted by the judge was not an adversary proceeding in the nature of a trial controlled by rules governing the allocation between the parties of the burdens of proof or persuasion. The inquiry was simply a proceeding necessary to aid the judge to discharge the responsibility laid upon him to enforce the statute. The function of prosecution and defense at the

inquiry was not so much a function of their adversary positions in the trial proper, as it was a function of their duty to come forward with relevant evidence which might assist the judge in the making of his determination. These considerations standing alone suggest that the emphasis on the petitioners' burden to produce the evidence was misplaced. The statute says nothing of burdens of producing evidence. Rather it implies the duty in the trial judge affirmatively to administer the statute in such way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute—the interest of the government in safeguarding government papers from disclosure, and the interest of the accused in having the government produce "statements" which the statute requires to be produced.

The circumstances of this case clearly required that the judge call Toomey of his own motion or require the government to produce him. Not only did the government have the advantage over the defense of knowing the contents of the Interview Report but it also had the advantage of having Toomey in its employ and presumably knew, or could readily ascertain from him, the facts about the interview. In addition to the consideration that the interest of the United States in a criminal prosecution ". . . is not that it shall win a case, but that justice shall be done" *Berger v. United States*, 295 U. S. 78, 88, the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary. *United States v. New York, N. H. & H. R. Co.*, 355 U. S. 253, 256, note 5. Moreover, the petitioners' cross-examination of Staula had shown a *prima facie* case of their entitlement to a statement, and, at the least, the judge should have required the government to come forward with evidence to answer that case. Cf. *United*

States v. Costello, 145 F. Supp. 892, 894-895, note 13. Since the Interview Report was not, and under *Palermo* could not be, made available to the petitioners, and they thus had no way of knowing the significance of its contents to the question the judge was to determine, it saddled an unfairly severe burden on them to require them to subpoena Toomey as "their witness." In the role of petitioners' witness, they would be groping in the dark in questioning him, and they might be bound by his answers. As a witness called by the government or even as the court's witness, they would have a latitude in cross-examination to which the circumstances entitled them.

Instead of calling Toomey or having the government call him, the trial judge fell into further error by relying upon Staula to supply the information he sought. Over the objection of government counsel that the Interview Report had not been "recorded contemporaneously with the making of such oral statement," and over the objection of the petitioners that "if this man now reads that statement it loses its effect for purposes of impeachment," the judge directed Staula to read the Interview Report and say whether he was familiar with it. The witness said that he had never seen the report. The judge then asked Staula "... is that a substantially verbatim recital of what you told agent Toomey?" The witness replied, "That's not written up just the way the story is." "There are things in there turned around." It was after this testimony was elicited from Staula that the judge ruled he would not order the delivery of the Interview Report to the petitioners, and denied their motion to strike the witness' testimony.

Reliance upon the testimony of the witness based upon his inspection of the controverted document must be improper in almost any circumstances. The very question being determined was whether the defense should have the document for use in cross-examining the witness.

Under *Palermo*, the trial judge was not to allow the defense to inspect the Interview Report "in order to argue whether it should be allowed to see" it, since to do so would be inconsistent with the congressional purpose to limit access to government papers. Similarly, Staula should not have been allowed to inspect the Interview Report, since there necessarily inhered in the witness' inspection of the paper the obvious hazard that his self-interest might defeat the statutory design of requiring the government to produce papers which are "statements" within the statute. For example, the Interview Report states that Staula was unable to give any description of one of the robbers. This is in sharp contrast to his positive identification of Lester made on direct examination. Experienced trial judges and lawyers will readily understand the value of the use of the report on cross-examination of the witness. But the petitioners were deprived of the opportunity to make use of the report by the obviously self-serving declarations of the witness that it did not accurately record what he told the agent.

Moreover, failure of the judge to call for Toomey's testimony foreclosed a proper determination of the petitioners' motion to strike the witness' testimony. If the Interview Report was not the original or a copy of the paper Staula described, and that paper was destroyed, the petitioners were denied a statement to which they were entitled under the statute. Thus, even if the Interview Report itself were producible, a situation might have arisen calling for decision whether subsection (d) of the statute required the striking of the testimony of the witness. The parties argue whether destruction may be regarded as the equivalent of noncompliance with an order to produce under that subsection. The government contends that only destruction for improper "motives" or in bad faith should be so regarded. The petitioners contend that destruction without regard to the circumstances

should be so regarded. However, this record affords us no opportunity to decide this important question of the construction of subsection (d). We do not yet know that such a paper existed, and was destroyed, or the circumstances of its destruction, nor can we know without the benefit at least of Toomey's testimony.

We conclude that because of these errors in the conduct of the inquiry the petitioners are entitled to a redetermination of their motion for the production of Staula's pretrial statements, and of their motion to strike his testimony. However, we do not think that this Court should vacate their conviction and order a new trial. The petitioners' rights can be fully protected by a remand to the trial court with direction to hold a new inquiry consistent with this opinion. See *United States v. Shotwell Mfg. Co.*, 355 U. S. 233. The District Court will supplement the record with new findings and enter a new final judgment of conviction if the court concludes upon the new inquiry to reaffirm its former rulings. This will preserve to the petitioners the right to seek further appellate review on the augmented record. On the other hand, if the court concludes that the Government should have been required to deliver the Interview Report or other statement to the petitioners, or that it should have granted their motion to strike Staula's testimony, the court will vacate the judgment of conviction and accord the petitioners a new trial.

The judgment of the Court of Appeals is therefore vacated and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 53.—OCTOBER TERM, 1960.

Alvin R. Campbell, Arnold S.
Campbell and Donald Lester,
Petitioners,

v.

United States.

On Writ of Certiorari
to the United States
Court of Appeals for
the First Circuit.

[January 23, 1961.]

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER join, dissenting in part and concurring in the result in part.

What is this case? In the course of a prosecution for violation of the Federal Bank Robbery Act, 18 U. S. C. § 2113, Dominic Staula, a government witness, identified defendant Lester as one of three men whom he had observed committing the alleged offense. Upon cross-examination, he disclosed that, on one occasion at local police headquarters, he had been interviewed by at least two FBI agents. He stated that he did not sign any statements, but only signed "a piece of paper saying I was in the bank." On the basis of this testimony the defense requested "the statement of this man" under the Jencks Act, 18 U. S. C. § 3500, which requires that the court order the Government to produce "any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." The trial judge denied this request on the ground that the defense had "laid no foundation for it" since "this man said nothing was ever read back to him." No exception was taken to this ruling. In the continuing cross-examination that followed, Staula changed his testimony by recalling that the agents had written down what he had told them, that "it" was read back to him, and that he had told the agents "it" was "essentially what [he] . . . had just related to them."

The judge then held *sua sponte* that a foundation had been laid for an order to the Government to produce the described document, and ordered the document produced. A colloquy at the bench followed, in the course of which Staula explained to the judge that since his earlier testimony he had recollected what had taken place; that he "believed" or was "pretty sure" that "it" had been read back to him; that what was read back was an accurate statement of what he had told the agents; that he thought they gave "it" back to him to read over and that he had to sign it, although he was not "sure." Government counsel stated at the bench that the only document in their possession was a "summary of the result of the interview" which represented the FBI agent's "interpretation of what happened." The judge then asked whether the Government possessed "any statement that was copied by an FBI agent which in any way would reflect a statement that this witness made and which he substantially adopted as the statement," to which government counsel replied "No, your Honor, we don't." A moment later the judge again asked, "Has the United States in its possession any notes that were taken down by the FBI agent at the time this witness was interviewed?" Government counsel answered "I do not have them in my possession and I do not know whether they ever existed." The judge then asked for and received the FBI agent's report referred to by the United States Attorney, and the case was adjourned for the day.

The following morning during a conference held in the judge's chambers the Government again asserted that the agent's report was not a copy of the original notes, and that the notes were no longer in existence. A long discussion ensued concerning the producibility of the agent's report. Defense counsel suggested that the FBI agent (Toomey) be called into chambers "to explain where he got the document," and to "say what he has done with

the original writing." This the judge denied, but suggested that the defendant was free to subpoena the agent, or, more simply, could ask the Government to have the agent made available for examination. The judge then proposed to ask Staula, out of the presence of the jury, whether the report was a substantially verbatim recital of what he had told the agent; and, if the answer were affirmative, the report would be given to defendant for impeachment purposes. Both sides opposed this move. The Government argued that in any event the report had not been "recorded contemporaneously with the making of such oral statement," and defendant's counsel objected because the impeachment value of the report would be negated by having the witness see the document and himself decide whether it conformed to what he had told the FBI. But Staula was shown the document. He denied that it was a "substantially verbatim recital of what [he] . . . told Agent Toomey," and the judge thereupon denied the defense access to the document for purposes of impeachment. Thereupon defendant moved that, in accordance with the Act, Staula's entire testimony be stricken because the Government had failed to produce "the original document." This motion was denied.

The case presents two entirely separate questions under the Jencks Act, and they should be kept apart. What are the procedural requirements, under the Jencks statute, when counsel for the United States announces that he cannot produce documents for which a foundation has been laid because he does not possess them and does not know of their existence? Secondly, was the FBI agent's available report producible under the Act?

I.

Title 18 U. S. C. § 3500 requires the trial judge, upon a motion by the defendant, to "order the United States to produce any statement . . . of the witness in the

possession of the United States" which is relevant to the direct testimony of the government witness. Nothing in the legislative history of the Act remotely suggests that Congress' intent was to require the Government, with penalizing consequences, to preserve all records and notes taken during the countless interviews that are connected with criminal investigation by the various branches of the Government. The legislation narrowed the application of our decision in *Jencks v. United States*, 353 U. S. 657, as construed by some of the lower courts, partly by having the relevancy of the material determined by the district judge prior to its production. S. Rep. No. 981, 85th Cong., 1st Sess., p. 2.

Petitioner's contention that the words "in the possession of" must be interpreted as meaning "possession at any prior or present time" must be rejected. Congress surely did not intend to initiate a game of chance whereby the admission of a witness' testimony is made to depend upon a file clerk's accuracy or care. Senator O'Mahoney, the sponsor of the bill, in illustrating that his measure approved the essential basis of the *Jencks* case, interpreted *Jencks* to apply only where the Government "had at the same time in its files a statement" pertinent to a witness' testimony. 103 Cong. Rec. 10120. See also S. Rep. No. 981, 85th Cong., 1st Sess., p. 5; H. R. Rep. No. 700, 85th Cong., 1st Sess., p. 5.¹

Here government counsel told the court that he did not possess and did not know the whereabouts of the documents which Staula had described. The Court today holds that it fell upon the district judge to conduct a further investigation as to the disposition of the documents, whereby it becomes his duty to call and question

¹ The Court's opinion implies that the defendant is entitled to statements which the Government does not now possess (p. 12). The Act plainly speaks only to a "statement . . . of the witness in the possession of the United States."

the FBI agent who signed the subsequent summary. Defendant did not question the truth or accuracy of the responses of the United States Attorney as to the non-existence of the original notes. Defendant was represented by two competent lawyers who were alert to protect their client's interest through all available trial procedures and tactics. It surely is not the duty of a district judge to investigate a response by one who is an officer of the court as well as of the United States on the assumption that he has intentionally or irresponsibly violated his responsibility to the court and the Government in conducting the Government's case in a manner consistent with basic legal ethics and professional care.

How does the court's duty regarding a claim by defense under the Jencks statute differ from any other claim for the production of a document? We are told that because Agent Toomey was readily available, it devolved on the judge instead of on the defendants to seek whatever light could be thrown on the matter. Is it now the duty of the district judge to do all that a competent defense counsel would do, or would choose, as a matter of trial judgment, not to do? The procedure now suggested places the judge in the position of a voluntary defender for defendants already adequately represented. This seems only the more questionable since it may well be that counsel here were satisfied that the documents had been disposed of in a bona fide manner. It is not the duty of this Court to invent hypothetical situations in which independent action by the district judge might have revealed unexpected facts. There was no suggestion, not a hint—neither before the trial court, nor below, nor upon argument here—that the Government's representation of the non-existence of the documents was not bona fide, was a piece of chicanery and as such a fraud upon the court bringing into action the court's protection of its dignity and honor, or a manifestation of professional inadequacy as to call for the court's safeguarding action.

II.

The other issue presented by the case is the producibility of the FBI agent's report which had been put into possession of the court. Subsection (e) of the Jencks Act thus defines the papers in the Government's possession that are subject to production:

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

The plain differentiation between the two clauses is that the former relates to statements written by a witness, while the latter encompasses his oral statements recorded and transcribed by another. As to the statements that the witness had himself set down on paper, Congress desired that his signature or some other form of approval be shown to assure authenticity. The required approval would also quiet any doubts that the witness did not have an adequate opportunity to scrutinize for verification the document which he had prepared. These are appropriate safeguards for the use of these documents as a basis for impeaching the witness' testimony on the stand. As to oral statements, the statute prescribes that their content be "a substantially verbatim recital" of the witness' words, recorded contemporaneously. "Clearly this provision allows the production of mechanical or stenographic recordings of oral statements, even though later transcribed." *Palermo v. United States*, 360 U. S. 343, 351-352. Producibility, for purpose of impeachment, of a statement drawn up in the third person by an agent,

requires that the whole oral statement be contemporaneously recorded. Under this standard, a summarization by an agent of selective portions of testimony by the witness would not fall within the scope of the Act. "[B]eyond mechanical or stenographic statements . . . a very restrictive standard is to be applied" in defining what is a "statement" under the statutory language. *Palermo v. United States*, *supra*, at 360. Under subsection (2), it makes no difference whether these agent summaries are signed or approved by the witness; "the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital." *Palermo v. United States*, *supra*, at 352. As the bill originally came out of the House Judiciary Committee, 103 Cong. Rec. 16125, such summaries when approved by the witness would have been subject to production. H. R. Rep. No. 700, 85th Cong., 1st Sess., p. 6. However, the subsequent revision of the bill as finally enacted makes clear that those statements of a witness given orally to the Government must meet the standard of "substantially verbatim" in order to be produced for purposes of impeachment.² See Appendix B, *Palermo v. United States*, *supra*, at 358-360.

In *Palermo*, we approved of the district judge holding proceedings *in camera* to determine whether questionable documents constituted statutory "statements." 360 U. S., at 354. It needed no explicitness to establish that the "substantially verbatim" test was to be made by extrinsic proof, not by asking the witness himself whether the docu-

² Insofar as the Court's opinion suggests that, had Staula signed the Interview Report, it would conclusively have been producible, we disagree. Under the statutory language, it still would have been necessary to find that the report was "a substantially verbatim recital" of that which Staula told the agents. Section (e)(1) is inapplicable.

ment in question substantially conformed to what he had told the federal agents. We agree with the Court that the procedure in which the trial judge indulged was erroneous. The witness might deny the accuracy of the document in order to avoid impeachment; even if produced, the document loses much of its potentiality for impeachment if the witness has already examined its contents.

But the trial judge's error in submitting, out of hearing of the jury, the Interview Report for Staula's determination of its accuracy would not warrant reversal if that report proves itself, on its face, not to be a statutory "statement." In *Palermo*, the document was a 600-word summary of a 3½ hour conference, which we held was clearly not a virtually verbatim transcript. 360 U. S., at 355, n. 12. The Interview Report here comes to slightly over 500 words. But the record is silent as to the duration of the interview. Nor does it disclose whether the interview was contemporaneously recorded,³ or how any such recording was transcribed. However doubtful it may seem, it may be the fact that the interview was very brief, not more than a few minutes, and that the conversation as an entirety was faithfully recorded and constituted an accurate account of all that transpired.

It is the responsibility of counsel for defendant, as has been elucidated, to pursue ascertainment of the correctness of the Government's claim that documents which are

³ Aside from Staula's conflicting testimony that the agent took notes.

During the proceedings in chambers, the Government repeatedly asserted that the report was not in existence at the time Staula was interviewed. Assuming this to be true, it is irrelevant; the question is whether there was a contemporaneous recording from which the transcription was later made. See *Palermo v. United States*, *supra*, at 351-352.

demandable for production under the Jencks Act are no longer in existence, and for no reprehensible reason chargeable to the Government. That is an issue like any other issue of appropriate evidentiary demand. It is not for the court to question that the foundation for production—here, the non-existence of a document and therefore its non-producibility—is wanting, if counsel for defendant does not question this prerequisite. A very different issue is presented in determining the legal significance of a document like the FBI report under the Jencks Act, which is produced for the confidential inspection of the court and not shown to the defense. Here the responsibility for resolving the issue rests with the court, and it is the court that must pursue appropriate means for ascertaining the facts relevant to judgment.

The district judge should and easily could have probed these matters, vital to ascertainment of the Jencks Act quality of the report, by interrogating counsel, or, as the Court suggests, examining Agent Toomey on the circumstances of the interview.⁴ Since on this record we cannot say that the report was patently not producible under the Act, we have no recourse but to remand the matter to the District Court for determination whether the report meets the requirements of subsection (e) (2).

⁴ Calling Agent Toomey for this purpose is a very different thing from requiring the judge to call him in order to controvert the Government's assertion that no other notes or documents were in their possession. That was for the defense to deal with.